

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

UNITED STATES OF AMERICA,)	Case No. 4:20-CR-000388
)	
Plaintiff,)	Appeal No. 22-50987
)	
vs.)	
)	
THOMAS SCOTT PERKINS,)	
)	
Defendant.)	Monday, July 19, 2022
_____)	8:20 A.M.

TRANSCRIPT OF JURY TRIAL, DAY 2
BEFORE THE HONORABLE DAVID C. COUNTS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: United States Attorney's Office
BY: SCOTT GREENBAUM, ESQUIRE
KEVIN CAYTON, ESQUIRE
2500 North Highway 118, Suite 200
Alpine, Texas 79830

For the Defendant: Office of the Federal Public Defender
BY: ELYSE BATALLER, ESQUIRE
MICHAEL F. GORMAN, ESQUIRE
700 East San Antonio, Suite D401
El Paso, Texas 79901

Deputy Clerk: Cristina Lerma
United States District Court
410 South Cedar Street
Pecos, Texas 79772

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FOR THE DEFENDANT:

(None)

Pecos, Texas - Tuesday, July 19, 2022

(8:20 a.m.)

P R O C E E D I N G S

---000---

(Outside the presence of the jury; defendant present)

THE CLERK: All rise.

THE COURT: Thank you. Mr. Cayton, anything?

Mr. Greenbaum, before we bring the jury in?

MR. GREENBAUM: Judge, I did mention one thing to Ms. Salas. Defense Counsel was there, Your Honor. We do have an expert, but we would only call him in rebuttal, Your Honor. That's Dr. Samuel Brown, and he's the BLP doctor that evaluated the defendant, Your Honor.

He is actually -- so he's from Dallas/Fort Worth area. He's actually physically in the State of Oklahoma testifying today in federal court, Your Honor. As soon as he's done, my understanding is he's going to come down here to Pecos. He should be here first thing in the morning, Your Honor. And he would only be called potentially in rebuttal.

So he may not even be called. But I just wanted to bring that to the Court's attention that he'll be available first thing tomorrow morning. He's shooting to get here sometime tonight from Oklahoma, Your Honor.

THE COURT: So if everybody -- if you all rest and -- so this is what you're telling me. If you all rest and the Defense is done today and we still have court time, you want me

1 to hold everybody 'til tomorrow morning since one of your
2 witnesses who's required to be here first thing Monday morning
3 when we start to get here? That's what you're asking.

4 MR. GREENBAUM: Yes, Your Honor. And we will talk
5 about that, too. So we're not -- I mean, I just wanted to bring
6 this up to the Court's attention. But we'll make that call, Your
7 Honor, because if it's -- yes, Your Honor. We're going to make
8 that -- have that conversation. So it may change. If we're done
9 at say ten, Your Honor, everybody's done at ten or if they don't
10 call that witness, then we --

11 THE COURT: Y'all decide all that.

12 MR. GREENBAUM: Yes, sir.

13 THE COURT: Y'all can talk about all that without me
14 involved. I'm just saying that's why we require witnesses to be
15 here. I can't help it that they have -- they're finally having
16 trials in Oklahoma. Good for them. Whatever. That doesn't make
17 it any easier for this jury, these defense attorneys who have I
18 think come from El Paso and are staying overnight, our staff who
19 -- you guys are traveling.

20 You know, it's not like -- anyway. That's why we have
21 the rule because one of the first trials I ever tried, I forget
22 even where it was, Ms. Lerma might remember, people -- we had --

23 THE CLERK: It was Pecos.

24 THE COURT: Was it Pecos, too? We had people tricking
25 in for days, and you just can't try a case that way. It's not

1 fair, it's not right. We'll see where we go. I'll consider any
2 requests you have.

3 MR. GREENBAUM: Yes, Your Honor.

4 THE COURT: I mean, I'll make the decision and we will
5 live with that. I thought the motion to have him appear by Zoom
6 was interesting. I got a chuckle out of it. Defense opposed it.
7 I don't know why you would want to present him by Zoom. I
8 suppose that might have been a last resort. In late May when
9 Mr. Gorman, and I don't remember who the prosecutor was when we
10 had that hearing, was it Mr. Greenbaum?

11 MR. GREENBAUM: It was me, Your Honor.

12 THE COURT: I just remember Weber was on it for a
13 while.

14 MR. GREENBAUM: Yes.

15 THE COURT: Right? Mr. Weber? I mean, I think we all
16 anticipated at the time that was probably going to be necessary,
17 that psychiatrist was going to be necessary. We did that by Zoom
18 because it was of course dueling Zoom battles I guess as I
19 recall. We might have had one live.

20 MR. GREENBAUM: I had my expert here live, Judge.

21 THE COURT: So he knows how to get here. But where's
22 he from?

23 MR. GREENBAUM: He's from Dallas/Fort Worth area.

24 THE COURT: He's in the BOP system?

25 MR. GREENBAUM: Yes, Your Honor. That's correct.

Yanez - Direct (Resumed) / Cayton

7

1 THE COURT: Okay. All right. Mr. Gorman,
2 Ms. Bataller, anything y'all need before we --

3 MS. BATALLER-SCHNEIDER: No, Your Honor. Thank you.

4 THE COURT: Okay. Very good. Let's bring the jury in.
5 (Jury in at 8:25 a.m.)

6 THE COURT: All right. Let's be seated, please. Thank
7 you. Good morning. Welcome back. If you can put your tags back
8 on. If you happened to have left it in the room, you can get it
9 next time during break.

10 I believe, Mr. Cayton, you were conducting direct
11 examination of this witness. You go right ahead.

12 MR. CAYTON: Thank you, Your Honor.

13 ANTONIO YANEZ, GOVERNMENT'S WITNESS, PREVIOUSLY SWORN

14 DIRECT EXAMINATION (RESUMED)

15 BY MR. CAYTON:

16 Q Good morning, Agent Yanez.

17 A Good morning.

18 Q I realized that I neglected a little bit yesterday to talk
19 about some of your experience as a computer forensics agent. And
20 I ask that you -- do you still have that folder up there? Is
21 there a folder in front of you?

22 A Yes.

23 Q Can you flip to Government' Exhibit 8 for identification?

24 A Okay.

25 Q Are you there?

Yanez - Direct (Resumed) /Cayton

8

1 A Yes.

2 Q Can you tell me what this document is?

3 A It is my curriculum vitae.

4 Q And --

5 A Or my resume.

6 Q Your resume? And so does this describe your training and
7 experience in the -- your experience being a computer forensics
8 agent?

9 A Yes.

10 Q And how do you know that's what your document is?

11 A Because I prepared it.

12 MR. CAYTON: Your Honor, at this time, the Government
13 would move Government Exhibit 8 for identification into evidence
14 as Government Exhibit 8.

15 THE COURT: Mr. Gorman?

16 MR. GORMAN: No objection, Your Honor.

17 THE COURT: Government's Exhibit 8 is admitted without
18 objection.

19 (Government Exhibit 8 admitted into evidence)

20 MR. CAYTON: And, Your Honor, the Government would also
21 ask that Agent Yanez be recognized as an expert in the area of
22 computer forensics.

23 THE COURT: Mr. Gorman? Mr. Gorman, do you have any
24 objection? Did you hear -- Mr. Cayton, say that again. I think
25 Mr. Gorman was busy, was talking.

Yanez - Direct (Resumed) /Cayton

9

1 MR. GORMAN: Sorry. Your Honor, obviously we took that
2 matter up. Obviously we have an opposition to that from the
3 Daubert motion, Your Honor.

4 THE COURT: Okay. Thank you. The Court so finds.

5 BY MR. CAYTON:

6 Q Agent Yanez, I think when we ended yesterday, we were
7 talking about two videos, one titled awesome preteen compilation
8 two. Do you recognize that video?

9 A Yes.

10 Q And what is of particular significance of that video?

11 A It's a compilation of numerous videos, or a collection of
12 numerous videos that have been edited and put into one video.

13 Q and I believe yesterday you testified that that was one of
14 the videos that was a NCMEC video?

15 A Correct.

16 Q And just to refresh everyone's recollection, NCMEC is the
17 National Center for Missing and Exploited Children?

18 A Yes.

19 Q And they kind of have a clearinghouse of known child
20 pornography?

21 A Correct.

22 Q Now can you describe a little bit more about what a
23 compilation is? You just said it's a collection of videos?

24 A Yes, a collection of videos that have been edited into one
25 video.

Yanez - Direct (Resumed) /Cayton

10

1 Q So when you're doing an analysis, can you tell who created a
2 compilation video?

3 A I can't.

4 Q But this particular compilation was a known nickname?

5 A Yes.

6 Q The video?

7 A Yes.

8 Q Now when we're talking about a compilation video, you said
9 it's multiple videos edited together?

10 A Yes.

11 Q Is it necessarily the same victim or the same child in each
12 one of those videos?

13 A No.

14 Q Is it possible that someone collected a bunch of child
15 pornography and made a video with a bunch of different child
16 pornography videos?

17 A Yes.

18 Q Does that appear to be what happened in awesome preteen
19 compilation two?

20 A Yes.

21 Q And you viewed this video, as well?

22 A I did.

23 Q We also talked about a video titled PTHC Kelly 8YO-sucking
24 and trying to fuck. Did you view that video?

25 A Yes.

Yanez - Direct (Resumed) /Cayton

11

1 Q Was this video also one of the known NCMEC videos?

2 A Yes.

3 Q And both of these videos are also on the disc that's
4 Government Exhibit 41 I believe.

5 A Yes.

6 Q And can you tell me which -- where these videos were found
7 on the defendant's device?

8 A So may I refer to my notes?

9 Q With the Court's permission to refresh your recollection.

10 THE COURT: Of course.

11 THE WITNESS: So awesome preteen compilation two was
12 located on USB3 and USB12. And PTHC Kelly eight-year-old is
13 located on CT -- C2H1, USB3, and USB12.

14 BY MR. CAYTON:

15 Q Now when we talk about videos being found on more than one
16 device, how would that happen?

17 A If videos are found on more than one device, it's possible
18 that the videos were copied or cut and pasted into another --
19 another location. Or moved from one location to another.

20 Q And I think you talked a little bit about copying and
21 pasting yesterday?

22 A Yes.

23 Q In your experience as a computer forensics agent, is it
24 common to find multiple copies of videos or evidence on different
25 devices?

Yanez - Direct (Resumed) /Cayton

12

1 A Yes.

2 Q And this is specifically in child pornography
3 investigations?

4 A Yes.

5 Q And just to refresh the Court, C2H1 was a desktop computer?

6 A Yes.

7 Q And then the USB 3 and USB12, they were both external hard
8 drives?

9 A Yes.

10 Q I know we were having trouble playing some of the evidence
11 yesterday. I'd like to -- I think we got through three videos.
12 I'd like to go back to the video I believe we discussed a little
13 bit but we were not able to play. And that was a video entitled
14 4YO PTHC R@Y gold reel. Do you recognize that video?

15 A Yes.

16 Q And what device was that found on?

17 A It was on C1H1.

18 Q So that would relate to the Western Digital hard drive
19 listed in Count 2 ending in 661471?

20 A Yes.

21 MR. CAYTON: And at this time, Your Honor, I would like
22 to show a four-second clip.

23 THE COURT: Yes, sir.

24 (Video played at 8:32 a.m.)

25 MR. CAYTON: And you can stop it.

Yanez - Direct (Resumed) /Cayton

13

1 BY MR. CAYTON:

2 Q Do you recognize that video?

3 A I do.

4 Q And is that the 4YO PTHC R@Y gold reel?

5 A Yes.

6 Q And we also talked about for a video entitled boy 06. And
7 that was located on L2H1?

8 A Correct.

9 Q And specifically that's for Count 4, the Seagate hard drive
10 ending in 5QBVZ?

11 A Yes.

12 MR. CAYTON: And, Your Honor, at this time I'd like to
13 play a four-second clip from this video. It would take --
14 there's a particular portion of the video I would play in the
15 middle. It would take a brief moment to queue up that portion, I
16 believe.

17 THE COURT: Okay. Go right ahead.

18 (Pause)

19 THE COURT: While she's doing that, Mr. Cayton, on
20 Count 2, what was the name of that video?

21 MR. CAYTON: 4YO PTHC R@Y gold reel, three exclamation
22 points.

23 THE COURT: What's the beginning? The beginning part
24 is what?

25 MR. CAYTON: 4YO.

Yanez - Direct (Resumed) /Cayton

14

1 THE COURT: Okay. PTHC?

2 MR. CAYTON: PTHC R@Y gold reel.

3 THE COURT: Okay.

4 BY MR. CAYTON:

5 Q And, Agent Yanez, while that's being queued up, the video we
6 just saw, it's titled 4YO. Can you tell us what your
7 understanding of that means based upon your experience?

8 A A four-year-old.

9 Q And the child in the video, did that appear consistent with
10 what you saw?

11 A Yes.

12 Q I believe yesterday we saw a video --

13 MR. CAYTON: Or is it ready?

14 (Off microphone comment)

15 MR. CAYTON: It's okay.

16 (Pause)

17 THE COURT: Let's just move on if it won't play.

18 MR. CAYTON: That's fine.

19 BY MR. CAYTON:

20 Q The video that was just a screen shot up on the screen, do
21 you recognize that video?

22 A Yes.

23 Q It was a kind of grainy video?

24 A Correct.

25 Q Do you remember what is depicted in that video?

Yanez - Direct (Resumed) /Cayton

15

1 A Not -- no.

2 Q And that video is in evidence and we can try to play that a
3 little bit later. Count 6? Moving to a video titled PTHC Tara
4 brand new, do you recognize this video?

5 A Yes.

6 Q And that video is related to a Seagate hard drive ending in
7 Q02S9?

8 A Yes.

9 Q And that's related to Count 6?

10 A (No audible response)

11 MR. CAYTON: Now while it's being queued up and, Your
12 Honor, with the permission, I'd like to play a short clip from
13 that.

14 BY MR. CAYTON:

15 Q But while that's being queued up, yesterday we saw the video
16 titled king pass two 022 Asian PTHC tied 8YO Cambodian boom-boom.
17 Do you remember that video?

18 A Yes.

19 Q Was there anything of significance in that video besides any
20 sexual acts being done to the child about the child?

21 A Yes.

22 Q What particularly was the significance?

23 A The child was bound. Her hands were bound to her legs with
24 appeared grey duct tape.

25 Q And would that be consistent -- and the title has tied 8YO.

Yanez - Direct (Resumed) /Cayton

16

1 Would that be consistent with an eight-year-old and she was tied
2 up?

3 A Yes.

4 MR. CAYTON: And at this point, Your Honor, I'd like to
5 play a four-second clip from the PTHC Tara brand new for Count 6.

6 THE COURT: And this corresponds with which count?

7 MR. CAYTON: Count 6, Your Honor.

8 THE COURT: 6? Okay.

9 (Video plays at 8:38 a.m.)

10 MR. CAYTON: And you can turn that off.

11 BY MR. CAYTON:

12 Q Do you recognize this video?

13 A Yes.

14 Q And this video is long, correct?

15 A Yes.

16 Q We just saw a sex act of oral sex being performed?

17 A Yes.

18 Q Is that the only sex act that's being preformed on that
19 child?

20 A No.

21 Q What other sex acts are on that video --

22 A Well as far as the sex acts, I'm not familiar with the rest
23 of the video. I just remembered that part.

24 Q Okay. And the next video would be Ulia two seven. We
25 discussed this yesterday. And that would be off of USB5?

Yanez - Direct (Resumed) /Cayton

17

1 A Correct.

2 Q And that would correspond with Count 7?

3 A Yes.

4 MR. CAYTON: With the Court's permission, I'd like to
5 play a short clip.

6 THE COURT: Yes, sir.

7 MR. CAYTON: And that's enough.

8 (Video plays at 8:39 a.m.)

9 BY MR. CAYTON:

10 Q Do you recognize that video? Is that Ulia two seven?

11 A Yes.

12 Q And that's one of the videos that you found on USB5?

13 A Yes.

14 Q And there was an image that we introduced into evidence, and
15 that's titled \$RLISUOD. Do you recognize that image?

16 A Yes.

17 Q And that's from USB8?

18 A Correct.

19 Q And that corresponds with the Samsung hard drive ending in
20 0311 or 188?

21 A Yes.

22 Q And that corresponds with Count 8?

23 A Correct.

24 MR. CAYTON: And, Your Honor, that's a picture. May I
25 place it up just for a couple seconds?

Yanez - Direct (Resumed) /Cayton

18

1 THE COURT: Sure.

2 MR. CAYTON: And that's fine. You can take it off.

3 BY MR. CAYTON:

4 Q Do you recognize that picture?

5 A Yes.

6 Q And that's the picture that we just discussed?

7 A Yes.

8 Q And then for Count 9 there's a video titled

9 PTHC!!!new0604!!!11Lily3YO?

10 A Yes.

11 Q Do you recognize that video?

12 A Yes.

13 Q And that was found on the SimpleTech hard drive?

14 A Yes.

15 Q And that's USB12 that corresponds with Count 9?

16 A Correct.

17 MR. CAYTON: Your Honor, at this point I'd like to play
18 a short clip of this video.

19 THE COURT: Yes, sir.

20 MR. CAYTON: And that's enough.

21 (Video plays at 8:40 a.m.)

22 BY MR. CAYTON:

23 Q And in the title is 3YO?

24 A Yes.

25 Q Does that seem to correspond with the age of the child in

Yanez - Direct (Resumed) /Cayton

19

1 that video?

2 A Yes.

3 Q And that would be a three-year-old?

4 A Correct.

5 MR. CAYTON: May I have just a moment, Your Honor?

6 THE COURT: Sure. Yes, sir.

7 (Pause)

8 BY MR. CAYTON:

9 Q And while we're trying to solve the technical difficulty
10 with that, that last one, because I believe it has important
11 evidence in it, I did discuss with you a little bit about VPNs.
12 Do you know what a VPN is?

13 A Yes.

14 Q Can you tell the Court what a VPN is?

15 A It's a virtual private network. It allows a user to send
16 data to a server or another computer, and the data on -- that is
17 sent is encrypted or scrambled. So somebody in between can't --
18 or a device in between cannot visually see the data or make out
19 the data. It's a way to secure data.

20 Q Now does the U.S. Government use VPNs?

21 A Yes.

22 Q In what way?

23 A For remote working, teleworking. I can be working from home
24 and connected to a server at the office or another location and
25 access files.

Yanez - Direct (Resumed) /Cayton

20

1 Q And when you're using the VPN, does it make it a more secure
2 way to work on your --

3 A Yeah.

4 Q -- Government work?

5 A Yes.

6 Q And did you find any evidence on the defendant's computers
7 of VPNs being used?

8 A I did not.

9 Q Did you search for that evidence?

10 A Just in the course of scanning through the evidence, I did
11 not see anything. But to say that I searched exactly for a VPN,
12 no, I did not.

13 Q Now I want to go back there and talk about each of these
14 hard drives. I think yesterday you talked about a very large
15 number of images that you found, correct?

16 A Correct.

17 Q For the different hard drives, can you tell us how many
18 videos and images that you found on the drive ending -- or the
19 Western Digital drive C1H1?

20 A Photographic images, I found 6,026.

21 Q And what about videos?

22 A Videos, 17.

23 Q And those were videos and images that related to child
24 exploitation material?

25 A Yes.

Yanez - Direct (Resumed) /Cayton

21

1 Q For C2H1 that corresponds to Count 3, how many images and
2 how many videos?

3 A Images, 6,402. And videos, 115.

4 Q For L2H1 that corresponds to Count 4, how many images did
5 you find?

6 A I'm sorry, for which device?

7 Q L2H1.

8 A L2H1 was 92 videos.

9 Q What about images?

10 A Images? No images.

11 Q For USB3 that corresponds to Count 5, did you find any -- I
12 know that we showed one video. Did you find any other images or
13 videos?

14 A Yes, 183 images and 125 videos.

15 Q For USB number 4, did you find any other videos or images?

16 A Yes. Just before I found 396 images and 6 videos.

17 Q For USB5, besides the video that we saw, did you find any
18 other images or videos?

19 A Yes, 34 images and 2 videos.

20 Q For USB8, I know we saw an image for that one. Did you find
21 any other images or videos?

22 A Just on that one video. Or --

23 Q Just the one --

24 A -- one image, I'm sorry.

25 Q And for USB12, we saw a video. Did you see any other images

Yanez - Direct (Resumed) /Cayton

22

1 or videos?

2 A Yes, 82,274 images and 880 videos.

3 Q Now USB12, we have it up here in evidence, but it's a little
4 bit bigger than the external hard drives. Is that correct?

5 A Correct.

6 Q And what exactly is USB12?

7 A Can I refresh my memory in my report?

8 Q And would you like to see the device?

9 A Yes, please.

10 MR. CAYTON: Your Honor, with permission, I'd like to
11 approach?

12 THE COURT: Of course.

13 MR. CAYTON: And this is Government Exhibit 30.

14 BY MR. CAYTON:

15 Q Can you tell me what this device is?

16 A It is an external USB device. It's an enclosure that has
17 hard drives in it.

18 Q You say hard drives. Is there more than one drive in there?

19 A There's two hard drives, I believe.

20 Q And would this be a backup device?

21 A Correct.

22 Q That has two drives in it?

23 A It could be used as a backup, yes.

24 Q Or for storage?

25 A Or for storage, yes.

Yanez - Direct (Resumed) /Cayton

23

1 Q Now I believe yesterday when you were talking, you said that
2 this one held a significant number of terabytes in itself.

3 A Yes.

4 Q And we talked about how large a terabyte is. And so when
5 you just listed a number of I believe 82,274 images, this device
6 had a lot of data on it?

7 A Yes.

8 Q A lot of images and videos?

9 A Yes.

10 Q Now when you're doing the forensic search, are you only
11 looking for images or videos, or are you looking for other
12 objects, as well?

13 A Also looking for other objects.

14 Q Are you looking to try to see if you can determine any
15 search terms that were used?

16 Q Yes.

17 Q And what specific search terms are you looking for in a
18 child pornography case?

19 A Well, in this case I -- the forensic software was able to
20 identify certain -- or search terms that were used throughout the
21 devices. So I sorted the search terms and then just scrolled
22 through and looked for some of the search terms commonly
23 encountered in these cases. So I found quite a few.

24 Q And what specific search terms did you find?

25 A I found -- one of the search terms I found was kiddie porn,

Yanez - Direct (Resumed) / Cayton

24

1 naked preteen, naked preteen girls, naked preteen boys. Would
2 you like me to go through a list of the ones I found?

3 Q Are there other ones that you found significant for child
4 pornography cases?

5 A Yes. There was hope model (phonetic) and laura model
6 (phonetic). I've seen those in other investigations.

7 Q And are those known child pornography series?

8 A Yes.

9 Q Now are you finding -- where are you finding these search
10 terms on a device?

11 A On a device, don't believe they would be an internet search,
12 internet browser history search terms.

13 Q Now we talked a little bit about torrents yesterday. How
14 does one know what torrent to find if they're looking for
15 something?

16 A A person -- or a person can search for certain torrents
17 using Google, Google search.

18 Q So an internet search would be helpful in finding a
19 particular torrent that a person's looking for?

20 A Yes.

21 MR. CAYTON: May I have just a moment, Your Honor?

22 THE COURT: Yes, sir.

23 (Pause)

24 MR. CAYTON: Your Honor, I'll pass the witness at this
25 time.

Yanez - Cross/Gorman

25

1 THE COURT: Thank you.

2 Mr. Gorman, your witness.

3 CROSS-EXAMINATION

4 BY MR. GORMAN:

5 Q Good morning, Agent Yanez.

6 A Good morning.

7 Q Agent Yanez, your work is in forensics, correct?

8 A Yes.

9 Q And forensics is science?

10 A Yes.

11 Q So you more or less follow what they call scientific method?

12 A Yes.

13 Q And scientific method involves testing, recording, analyzing
14 information, offering conclusions of that information and then
15 documenting those conclusions in a report, correct?

16 A Correct.

17 Q So for example, in high school chemistry with which many
18 would be familiar, we conduct a laboratory experiment and that
19 ends with a report documenting our conclusions, correct?

20 A Correct.

21 Q In fact, writing a report allows the judge, the jury,
22 defense, defense counsel to understand the circumstances of the
23 case, the evidence that was found and more or less how the
24 evidence plays into your opinions in this case, correct?

25 A Correct.

Yanez - Cross/Gorman

26

1 Q Did you do a final report in this case?

2 A The reports that I have submitted are my reports in the
3 case.

4 Q But a final comprehensive report and all findings, did you
5 do that?

6 A Through the dates of the reports, yes.

7 Q Okay. But nothing -- so was there a single report that
8 documented all the files, all the information essentially you're
9 discussing now that would produce essentially to the parties, the
10 Court or otherwise, did you do that?

11 A No.

12 Q Okay. So in terms of your analysis, nobody could really
13 review these because you personally possessed them, correct?

14 A As far as the reports because they weren't created, no.

15 Q Correct. Thank you. In terms of these numbers you just
16 discussed, the substance of those numbers, that again is an
17 opinion, correct?

18 A The substance of the numbers?

19 Q So for example when you say there are 10,417, that would be
20 something that you hold personally, correct?

21 A As far as hold personally, are you saying the files or
22 the --

23 Q The foundation of that. I'll try it a different way. When
24 you're going through your analysis, you select when you say I
25 found this type of file, you call that bookmarking, correct?

1 A Correct.

2 Q And these numbers you're giving are more or less the number
3 of bookmarks you had or files contained within those bookmarks,
4 correct?

5 A Correct.

6 Q So in this case, when you bookmark something, that is your
7 personal assessment of the contents of that video or image,
8 correct?

9 A Correct.

10 Q And in this case, that is not a legal determination. That
11 is an opinion, correct?

12 A Correct.

13 Q Turning to the computers involved in this case, your first
14 step in this, Agent Yanez, was to look at these computers,
15 correct?

16 A As far as the -- giving an inventory on them and looking at
17 them and -- how would you say looking at them, visually putting
18 eyes on them or --

19 Q I'll give you a definition. Your job, and we'll start it up
20 in El Paso where these computers were brought in custody.

21 A Okay.

22 Q You start with the physical computer, right?

23 A Correct.

24 Q As part of your investigation into those computers, do you
25 search or research the ownership history of those objects?

1 A I don't.

2 Q So in terms of defining from the date that was produced to
3 the date somebody purchased it to the date it was seized, you
4 haven't run down that history?

5 A I do not.

6 Q So in terms of ownership, you're looking at sort of the last
7 holder of the computer, correct? The last person that physically
8 possesses this computer. Would that be correct to say?

9 A As far as the location, I would say to the location where it
10 was seized, yes.

11 Q And when you create your working copy of this drive, that's
12 based on that device, correct? You've taken that out of the
13 physical and brought it into your computer system, correct?

14 A Yes.

15 Q And in terms of that ownership history, if a device is
16 handed to you secondhand, thirdhand, or, you know, 100th hand in
17 terms of people passing it along, all that evidence would likely
18 be still sitting on that device, correct?

19 A Correct.

20 Q More or less an accumulation of the entire history of that
21 computer device, correct?

22 A Correct.

23 Q And many of the objects or pieces of information in that
24 computer cannot be seen by a normal user. For example, anyone
25 sitting in this court with a computer would not be able to

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1 determine what all the files that may be possibly viewable by you
2 through these -- through this expensive forensic software. Would
3 that be correct to say?

4 A Can you repeat the question again?

5 Q So the average user, somebody that bought a computer,
6 plugged it in and turned it on, the files you can see may not be
7 visible to the person that buys a computer. Is that correct?

8 A Correct.

9 Q Because some of these things, and I think you've discussed
10 it a little bit, deleted files that may be resident in some of
11 these files, they call them carving, that the forensic software
12 pulls it out and makes it visible to you. That's not a process
13 that's sort of normal to most regular computers, correct?

14 A Correct.

15 Q Now yesterday you discussed a number of items about file
16 histories and details on files that I think many people probably
17 get a little bleary-eyed when they're looking at all these dates
18 and times and all that sort of thing on the screen. But when you
19 look at that, those dates and times, and this is at a forensic
20 level, those aren't set in stone, correct? Those can be
21 modified.

22 A Yes, they can be modified.

23 Q Sometimes they're modified by a system, correct?

24 A Modified by a system as far as system files, yes.

25 Q Yeah. For example, and I'll try not to get too in the weeds

1 on the computer details. But Microsoft Windows, most people
2 understand Microsoft Windows just comes with the computer, but a
3 lot of what's happening when you see that information is from
4 Microsoft Windows, correct?

5 A Correct.

6 Q But are there programs out there that can change those
7 details, for example dates, times? Are there programs that are
8 able to access that and twist those dates to something they're
9 not?

10 A Yes.

11 Q And in terms of that, that can affect your reviews, correct?
12 It can be more challenging because some programs are capable of
13 operating these -- of operating on those sort of fundamental
14 details you have to work with. Would that be correct to say?

15 A True. Yes.

16 Q So when we look at this, that could be a user that does it.
17 It could be a human person that sits on a program just deciding
18 to corrupt a file to change it to make it look like it's 1990
19 instead of 2022. That can happen with a user, correct?

20 A A user can do that, yes.

21 Q And in terms of things that are not users, for example a
22 virus or what they call malware, these bad programs that invade
23 our computer, they can do that too, correct?

24 A I'm not aware of viruses that can change time stamps.

25 Q So have you as a forensic expert, have you heard of anti-

1 forensic measures?

2 A Yes.

3 Q Have you heard of about time stamping?

4 A Time stamping, yes.

5 Q Isn't time stamping essentially a virus's ability to change
6 the details in terms of file properties to make it look like it
7 was there before the virus activity?

8 A My understanding of time stamping is a user actively going
9 in and using software to change it, to change times.

10 Q Are you acquainted with that showing up in the context of
11 malware or viruses?

12 A Personally I'm not aware of it, no.

13 Q Okay. And we go to some of these file properties. We talk
14 about file names, we talk about dates created, modified, whatever
15 that date information is. How valuable, when you look at
16 something like file name, is that in terms of it being set in
17 stone? Or better stated, how easy it is for any normal user to
18 change a file name on a file?

19 A It's not hard at all, no.

20 Q You just hit rename on the file, that gives it a different
21 name.

22 A You can click, right-click it and then select rename.

23 Q And that will still show up as a renamed file to you,
24 correct?

25 A Correct.

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1 Q And when you look at that information, and you've done a lot
2 of these searches in the context of this case, a lot of these
3 file names don't reflect the contents. Would that be correct to
4 say?

5 A I would say that there would be files in a system that do
6 not have -- might have a file name that doesn't correspond to
7 this type of content, yes.

8 Q So taking these sort of the terrible files that we've viewed
9 here in terms of that, you -- changing that to the Avengers does
10 not make the content change, correct? It's just --

11 A Correct. It just changes the name. That's all.

12 Q Okay. So in that sense, you focus more on content, correct?

13 A Correct.

14 Q And through content you're able to assess or compare files.
15 For example, when you're doing your searches, there's a way of
16 identifying files without regard to name, correct?

17 A Correct.

18 Q So that avoids the problem of saying somebody named these
19 files a common movie, you're not deceived by that, correct?

20 A Correct.

21 Q Now there's a concept, and you are acquainted with
22 computers, that pretty much you can program a computer to do
23 anything a user will do. Do you believe that?

24 A Can you explain the concept?

25 Q Okay. So let's put it -- let's try it this way. Could I

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1 script something in a computer when it starts up to cause actions
2 that the computer will take without my intervention?

3 A Yes.

4 Q They call them start up scripts, right?

5 A Yes. Or batch scripts.

6 Q So scripts aren't necessarily designed by the person sitting
7 at the computer, correct?

8 A It could be a user that places that -- those scripts on the
9 computer, correct.

10 Q Okay. And in terms of how those scripts can act, the
11 computer can have -- if it believes that it's been allowed to do
12 so is going to carry out those steps, correct?

13 A Correct.

14 Q And if something in Microsoft Windows that pretty much says
15 do you allow this computer or this program to change the contents
16 of this computer, that's something users, when they download a
17 program, are generally doing, correct?

18 A Correct.

19 Q More or less we're saying hey, whatever this program is, go
20 ahead and do what you want, I give you permission.

21 A Permissions, yes.

22 Q So when we were discussing yesterday how something might go
23 to a file or how something might be moved, ultimately you're
24 using more or less an assumption that says I would assume the
25 user would do this, not that you're saying no program could move

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1 something, do something, or otherwise. It was more or less in my
2 history I haven't seen something specifically move a file this
3 way. So when I say it would be a user, that doesn't mean there's
4 no possibility it wasn't a user, correct?

5 A User interaction. So a batch script would have to have --
6 be placed on a computer by a user, or another individual. So I
7 meant that as a user needed to interact with the computer to move
8 those files.

9 Q So specifically one of the questions posed to you was would
10 a user have to put this on an external hard drive, that if it's
11 on an external drive, it must be a user. Do you stand by that
12 statement?

13 A Yes.

14 Q So is there a way of making an external drive the primary
15 computer drive, meaning more or less when the computer starts up,
16 it goes to an external hard drive?

17 A Yes.

18 Q How do you do that?

19 A That is booting. Like it's like a boot. You would go into
20 the BIOS and set up the startup drive as a USB.

21 Q And that's more or less the computer, the system you see
22 sitting there, the hardware telling Microsoft Windows what to do,
23 correct?

24 A Where to start, where to look for an operating system, yes.

25 Q All right. So if you -- if you were telling that external

1 drive to do all the work of that computer, is that really
2 something that requires any sort of conscious act by the user at
3 that point to do anything? That's going to run that like it's
4 the main computer, right?

5 A You would need the user to go into the settings for the
6 computer and select the external drive as the operating system.

7 Q Correct. But in that sense, if the computer, secondhand or
8 otherwise, somebody set it up that way but you really don't know
9 that the person holding it did that, correct?

10 A I wouldn't know. No.

11 Q Right. Just we'd know somebody would have to change some
12 default setting somewhere --

13 A Yes.

14 Q -- on that computer to make it do that. But to say that we
15 know by virtue of it being external hard drive, this user did
16 this, we don't know that answer, correct?

17 A Correct.

18 Q Okay. And in the course of your searches through these
19 computers, did you run a search for viruses or trojans or those
20 sort of things?

21 A I ran the viruses on the devices themselves, the images. I
22 would run them through I believe it was AVS. AVG I believe.
23 AVG. I'm sorry. And I'd found some viruses, but I don't think
24 they were the type of viruses that would select or actually make
25 changes to the devices and download files.

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1 Q And what type of virus activity do you see? Like, what type
2 of virus? And refer to your notes if you need to.

3 A I didn't put it in my notes.

4 Q But were they trojans?

5 A I can't recall.

6 Q What is a trojan?

7 A A trojan is software that will run certain programs on a
8 computer.

9 Q And is that at the request of the owner of that computer?

10 A No.

11 Q And what can a trojan do to a computer?

12 A It can delete files.

13 Q Can it add files?

14 A I'm not sure. I'm not sure if it can add files.

15 Q Okay. And did you search for malware, as well?

16 A No. Well, it would be the virus I believe searches for
17 malware. I'm not sure if I did find any malware.

18 Q And is that virus search a protective measure for you, or is
19 that more of an investigative tool?

20 A I looked through it just to see if there was any -- any
21 evidence of viruses.

22 Q Because from your training, there have been computer
23 investigations in the past where measures have been taken more or
24 less to sabotage your forensic investigation, correct?

25 A I'm not -- I'm not --

1 Q Have you heard of zip bombs, something that you would get
2 into, you would analyze. When you open it, it releases something
3 into your system to more or less try to take your system down.
4 Have you ever heard of that?

5 A No, I haven't.

6 Q You've never encountered one?

7 A Never encountered one.

8 Q Okay. But those programs, those virus programs, if they
9 ever infiltrated your system, if you're not prepared for it, will
10 have a similar damaging effect, correct?

11 A I would believe so, yes.

12 Q And that's why most people are advised to have antivirus
13 system, some type of malware system, some type of firewall.
14 That's all a security measure to keep these problems out,
15 correct?

16 A Yes.

17 Q Now when you reviewed these computers in this case, did you
18 look to -- did you consider for example a use of counter
19 forensics tools? Did you look for things, like, things that
20 would write, things that would remove evidence, things of that
21 nature in terms of the programs on the computers?

22 A I think I did. I think I found a file or Gutmann I think
23 was a way to delete -- delete files, I believe.

24 Q And that was discussed previously. Those type of measures,
25 more or less if you have the ability to delete programs with

1 enough essentially they call them overwrites, but more or less,
2 could you explain what a pass or an overwrite is?

3 A A secured (indiscernible) overwrite, like I was explaining
4 yesterday, a file staying on a computer until it gets
5 overwritten. And in this case, it either gets overwritten by the
6 system itself or operating system, or by a program or, like, a
7 user that has a program that secure deletes something.

8 So what happens is the location where the files are, or the
9 locations in the file system get overwritten by random numbers or
10 specific numbers until that file no longer exists, or that
11 content no longer exists.

12 Q And they are commonly available. Or you commonly encounter
13 them in these investigations, correct?

14 A Yes.

15 Q And one of those might be, that's well known, they call it
16 C-cleaner or otherwise known as crap cleaner. That's a common
17 one, right?

18 A Yes.

19 Q And that program has the ability more or less to wipe away
20 everything, correct? Or most detectible artifacts or evidence of
21 a file, correct?

22 A Correct.

23 Q Because they have the highest level of I think it's they
24 call it DOD level. But there may be even higher than that at
25 this point. But it's very extensive and over and over. And

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1 eventually there's very little left of a file, correct?

2 A Yeah. That's an option. You can select the number of
3 passes that you make on the software or the file.

4 Q And when you go through your evidence in this case, Agent
5 Yanez, how many of the -- I guess you may have to give a
6 percentage, but how much of what you saw was deleted or carved or
7 something that had to be pulled from evidence, and how much was
8 sitting in active status that was just sitting on the computer?

9 A I can give you an estimate but --

10 Q All right. Could you give ballpark?

11 A I would say one percent.

12 Q Very little?

13 A Very little.

14 Q Okay. So there was not much evidence to try and make these
15 things go away, correct?

16 A Correct.

17 Q Or much effort, I mean. In terms of other measures, now
18 there's a tool that pretty much sits on every -- that comes with
19 every Windows computer sold and has for quite a while called
20 BitLocker. What is BitLocker?

21 A BitLocker is a way to -- a software. In this case it's a
22 Windows capability of encrypting the data on the hard drive
23 whereas once the user signs in, it allows -- it un-encrypts or
24 unscrambles the data on the hard drive. So if I would get a hard
25 drive that's encrypted, the data would be encrypted until I can

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1 get the recovery key for that BitLocker encrypted volume or the
2 hard drive.

3 Q And frequently, Government workers are told to travel with
4 that enabled, correct, in terms of carrying disc drives or
5 otherwise with sensitive information. That's an advisory sort of
6 statement to protect the data. Is that true?

7 A That's a way of protecting data. I'm not sure if that's how
8 Government employees are --

9 Q Okay.

10 A The protocol, what the protocol is.

11 Q And if that's turned on, if the drive is encrypted, without
12 that key, how difficult is it to investigate a case?

13 A Well, it depends. If the computer is on and the user is
14 signed in, then the data is available. But if a user is signed
15 in and -- or not signed in and the user profile is locked, then
16 it would be difficult to get access to it without the recovery
17 key.

18 Q And that's often months and months and months of added
19 effort to get to a drive or a device, correct?

20 A It would be a while depending on the encryption key, or we
21 can find the evidence of the recovery key somewhere at another
22 location.

23 Q And nothing like that was involved in this case, correct?

24 A Not to my knowledge, no.

25 Q Now some of the files that -- some of the file path

1 discussion, now people saw lengthy paths discussing these hard
2 drives. Do you recall that discussion yesterday?

3 A Lengthy paths?

4 Q File paths.

5 A Yes.

6 Q They were discussing the file paths and what that meant and
7 essentially what was shown there.

8 A Yes.

9 Q I'm trying to first give a visual when you look at a
10 computer what that file path looks like. Now when a person turns
11 on their computer, that thing they see on the screen is really a
12 folder, right? They call it the desktop. Is that correct?

13 A Correct, yes.

14 Q That's a folder, right?

15 A Yes.

16 Q So if there -- if somebody puts a folder on that desktop and
17 they were to look at that, then they now are -- it's really a
18 folder under a folder, correct?

19 A Yes.

20 Q And if you look at that same -- from Windows, there are a
21 lot of invisible elements leading up to the desktop such as user
22 name that goes to -- you know, that might go to desktop. That
23 goes to whatever's on the desktop more or less?

24 A Yes.

25 Q So as a visual, if you're talking about a file path that has

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1 one, two, three, four, five, six different slashes in it, that's
2 a folder buried in a folder, buried in another folder, buried in
3 another folder. So in terms of what's visible on the desktop,
4 that's fairly buried from the visible eye, correct?

5 A Correct.

6 Q So the more -- and the more times you copy something, for
7 example you do a backup, that can double the size. But if you
8 copy something from one desktop to another, that becomes a very
9 long file name, right?

10 A It depends on where you copy it to.

11 Q But it could be very lengthy, correct?

12 A It could if you keep on nesting folders.

13 Q Okay.

14 A Putting them in different nested folders.

15 Q Okay. So to the naked eye, these folders, when you talk
16 about very extended file length -- file names with a lot of
17 slashes in it, that's a pretty buried folder, correct?

18 A Yes.

19 Q Very hard to find if you're not sitting there. If you've
20 moved something around, not very easy to see, correct?

21 A To the naked eye, yes.

22 MR. GORMAN: Okay. One moment please, Your Honor.

23 THE COURT: Yes, sir.

24 MR. GORMAN: No further questions, Your Honor. Thank
25 you, Agent.

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1 THE COURT: Thank you. Redirect?

2 MR. CAYTON: Thank you, Your Honor.

3 (Pause)

4 MR. CAYTON: Your Honor, I believe we have queued up
5 the last video that I wasn't able to play earlier. I'm just
6 going to play from the beginning. We were trying to play in the
7 middle and that was part of the problem.

8 THE COURT: Okay.

9 MR. CAYTON: With the Court's permission.

10 THE COURT: Sure.

11 (Video plays at 9:13 a.m.)

12 REDIRECT EXAMINATION

13 BY MR. CAYTON:

14 Q And, Agent Yanez, this would be Boy06?

15 A (No audible response)

16 Q Do you recognize that video?

17 A Yes.

18 Q And was that video -- you can stop it. That video was found
19 on the Seagate hard drive ending in 5QBVZ?

20 A Yes.

21 Q And that's L2H1?

22 A Correct.

23 Q And that's for Count 4? That's the laptop?

24 A Yes.

25 Q And when the search warrant was being done, that's the

1 laptop that appeared to be connected in front of the computer?

2 A I'm not sure.

3 Q By the TV?

4 A I'm not sure.

5 Q It's the silver laptop though that we discussed earlier?

6 A Yes.

7 Q Now I want to talk to you a little bit about programs like
8 BitLocker the Defense just talked to you about. You mentioned
9 Gutmann, Secure Delete. Are these programs that are used by the
10 average user, in your experience?

11 A I'm not familiar with Gutmann. Secure Delete, I think it's
12 a Windows internal command line way of deleting files.

13 Q But in your experience, is this something that the average
14 user would do, or is this a more complex user?

15 A I believe more complex.

16 Q What about BitLocker? I know defense asked you a little bit
17 about government workers. Is BitLocker something that you
18 commonly would see in an average users usage of the computer?

19 A No, I wouldn't.

20 Q And Defense asked you a little bit about programs that can
21 rename files. Is this something that's commonly used by the
22 average user?

23 A I believe he mentioned the ease of changing the name. I'm
24 not sure if he mentioned a program. I can't remember if he
25 mentioned a program.

1 Q Well let's talk about changing names of files --

2 A Okay.

3 Q -- pretty quickly. What goes into changing the name of a
4 file.

5 A Normally you would, like I said, click on the file, right-
6 click on a file. And you can rename the file using the drop down
7 menu. Or you can click on the file and it presents the
8 highlighted file name. And then you can just type it -- retype
9 in the name.

10 Q So anyone can type in a new file name?

11 A Correct.

12 Q Now we saw a number of videos yesterday and today that had
13 long file names that had age ranges of children in them.

14 A Yes.

15 Q And did those files appear to be consistent with the file
16 names?

17 A Yes.

18 Q That were given for those files?

19 A Yes.

20 Q So it did not appear, at least to you, that anyone changed
21 that file name?

22 A Yes.

23 Q Now the Defense did ask you about running a script. You
24 talked about a user running a script. What is running a script?

25 A A script is basically a program, a small, coded program that

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1 will run certain commands on an operating system. And running a
2 script would be executing the program to run those commands.

3 Q So I'm going to date myself a little bit. Did you ever work
4 with MS DOS back in the day?

5 A A little bit in high school or middle school.

6 Q And maybe anyone who's seen MS DOS remembers just seeing,
7 like, a blank screen and it had a little cursor that said, like,
8 C:/ and a little point on it, right?

9 A Yes.

10 Q To run a script on MS DOS, do you have to type in a bunch of
11 code?

12 A No. I believe, if I remember correctly, you just type in
13 the command.

14 Q You could type in a command and that would be running a
15 script. Would that be fair to say? Or would you call it
16 something different than that?

17 A I mean, I would say if you -- a script to me is a bunch of
18 commands put together.

19 Q More like a modern program.

20 A Correct.

21 Q So I can go into Windows and I can double-click on say
22 Google Chrome or Internet Explorer, and the Explorer pops up?

23 A Correct.

24 Q Is there just one thing happening there, or are there a
25 bunch of things happening to get me to that window?

1 A A bunch of things I would say, yes.

2 Q Now someone who's creating a script, and I think Defense
3 gave you an example of a script where one program would
4 automatically dump files into an external hard drive. Is that
5 something that you, in your experience, an average user would
6 know how to do?

7 A An average user, no.

8 Q That would take a more complex user to know how to run those
9 commands to get the computer to do what it wanted to?

10 A Correct.

11 Q Now that -- now the Defense also asked you about programs
12 that are able to run scripts. And we talked just about Google
13 Chrome or Internet Explorer, things like that. And you have some
14 experience with BitTorrent software. Is that correct?

15 A A little experience, yes.

16 Q Does BitTorrent software automatically run scripts without
17 the user doing something to get files to dump into multiple
18 different drives?

19 A From my experience, no.

20 Q So the user would have to tell the program to do that?

21 A Correct.

22 Q Now the Defense asked you a little bit about carving or
23 modifying the dates and times of a file in the system. And they
24 also talked to you about deleting. And if you find a deleted
25 file, so maybe not a secure deleted file on a computer but a file

1 that someone just hits delete on, are you still able to see the
2 date and time that it was created and modified?

3 A From my experience, most of the files that are carved out,
4 or deleted and then extracted by the forensic software have most
5 of that information removed.

6 Q The metadata or the date and time information would be
7 removed?

8 A Yes.

9 Q Because your software is going in and finding that file, and
10 not through the normal file system because --

11 A Correct.

12 Q -- it's been deleted.

13 A Correct.

14 Q Fair to say? And Defense asked you about how much you saw
15 that was deleted. You said about one percent?

16 A From my memory, I believe one percent, yeah.

17 Q So that means when you're analyzing all these different
18 devices, you're only finding about one percent of items that
19 maybe is missing that data?

20 A Correct.

21 Q And therefore you have to carve out?

22 A Yes.

23 Q Is that a technical term?

24 A Carved out, yes. It's a --

25 Q And the Defense asked you about a few different ways that

1 maybe someone could go in and change that data --

2 A Yes.

3 Q -- so the time data. So most likely, the file that we saw
4 that was created and modified on January 1st, the year one,
5 that's not accurate?

6 A Correct.

7 Q As far as in your expert experience, computers were not
8 invented back then?

9 A True.

10 Q To make an external drive a boot drive, is this an easy
11 thing to do?

12 A As far as making the drive itself boot, or the actual going
13 into the system to --

14 Q Going into the system so that a computer will boot from an
15 external drive.

16 A It would be -- to somebody that knows how to do it, it
17 wouldn't be -- wouldn't be difficult. It's just a matter of I
18 would say googling how to change the boot -- boot menu and
19 getting those instructions and doing it.

20 Q So it takes a user with some computer knowledge to get the
21 right instructions to go in there and enter that code to do that.

22 A Correct.

23 Q Now in regards to the devices that you analyzed, did you
24 find, particularly in the file names, evidence that the defendant
25 Thomas Perkins was the owner and user of these devices?

1 A The user profile folder, the home folder.

2 Q And you found that for these devices for the defendant?

3 A On a few.

4 Q Did you find any evidence that these were ever owned by
5 anyone else?

6 A By the profiles of parents, of like their parents, Perkins,
7 John Perkins I believe. But not in the evidence provided. I
8 didn't see any -- any user profiles in the files that we reviewed
9 or I've selected.

10 Q So it appeared to you that all these devices were at least
11 operated by the defendant?

12 A Defendant or a general owner/user, I believe.

13 Q And we talked a little bit about folders yesterday and then
14 again today. And programs can create folders. Is that correct?

15 A Programs can create folders?

16 Q Yes.

17 A Yes.

18 Q So I can install a program and it'll say install a certain
19 folder on the drive for that program?

20 A Correct. Default folder, is that what you're talking about?

21 Q Yes.

22 A Yes.

23 Q But users can also create folders?

24 A Yes.

25 Q And in your forensic review of these devices, did you find

1 what appeared to you to be user-created folders?

2 A Yes.

3 Q Did you specifically find user-created folders in relation
4 to child pornography?

5 A Yes.

6 Q And folders like PTHC?

7 A PTHC, TIEM, and CP I believe, or child porn I believe is one
8 of the folders.

9 Q And I think we asked yesterday, would this be a default
10 folder that would be created?

11 A True, yes. No. It wouldn't be a default folder.

12 Q Now I want to go back a little bit to your analysis in
13 general. Of the devices that you analyzed, did you do a full
14 analysis of those devices?

15 A For the most part, yes.

16 Q Now you talked about yesterday hooking up your -- the device
17 to your computer and the write blocker and the forensic image and
18 getting your image. You're able to look at everything on the
19 computer with that forensic image and your software, correct?

20 A Yes.

21 Q And you're able to review these files that you listed the
22 numbers for the files?

23 A Yes.

24 Q All right. And what are you looking for when you're trying
25 to determine whether or not a particular file or image is a piece

1 of child pornography?

2 A I'm looking for file name, names indicative of this type of
3 material. I'll look through the -- I'll preview the image itself
4 or a thumbnail of the image to ascertain if it's this type of
5 material. And videos, I can also look at the preview of the
6 video, preview image of a video.

7 Q Are you looking for young children?

8 A Yes.

9 Q Are you looking for nudity?

10 A Nudity?

11 Q Yes.

12 A Yes.

13 Q Are you looking for sexual acts?

14 A Yes.

15 Q And so on the files that you -- you listed a whole lot of
16 them earlier, thousands and thousands of files. In those files,
17 did you find young children with nudity or sexual acts in those
18 files?

19 A Most of them, yes.

20 Q And the Defense asked you about creating a final report. Is
21 there anything in your final report that would not have been
22 present in the actual analysis you were doing on your computer?

23 MR. GORMAN: Objection. Leading, Your Honor.

24 THE COURT: Overruled. You may answer that question.

25 THE WITNESS: Can you repeat the question?

1 BY MR. CAYTON:

2 Q Is there anything in your final report that would not have
3 been present in the analysis that you have done and that you
4 viewed?

5 A I'm not quite sure if I understand the question.

6 Q So the Defense was asking you about a final report --

7 A Yes.

8 Q -- that you did not generate in this case, correct?

9 A Correct.

10 Q Okay. So you're doing your analysis. And you're able to
11 view the data for the files and the files themselves and the
12 videos and all that. Would you have gotten any more information
13 from your analysis if you had clicked generate report?

14 A No.

15 Q And is there anything that you were not able to review by
16 not doing that report?

17 A No.

18 Q Is there anything that anyone reviewed your software would
19 not have been able to review because there was not a final
20 report.

21 MR. GORMAN: Objection. Leading, Your Honor.

22 THE COURT: Overruled. You may answer the question.

23 THE WITNESS: No.

24 BY MR. CAYTON:

25 Q So all the data itself was available?

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1 A Yes.

2 Q Do you know how many known NCMEC images or videos were
3 found?

4 A No, I don't.

5 Q Were there more than the two that we talked about?

6 A Yes.

7 MR. CAYTON: May I have a moment, Your Honor?

8 THE COURT: Yes, sir.

9 MR. CAYTON: No further questions, Your Honor.

10 THE COURT: Thank you. Mr. Gorman?

11 MR. GORMAN: Thank you, Your Honor.

12 RECROSS-EXAMINATION

13 BY MR. GORMAN:

14 Q Agent Yanez, DOD is a form of a deletion, correct?

15 A Correct.

16 Q It isn't a program, correct?

17 A Correct.

18 Q When you're speaking of folders, can you actually download,
19 whether it's by a direct download, BitTorrent, can you download a
20 folder with sub-contents?

21 A Yes, sir.

22 Q So that folder taken from somewhere else will retain the
23 name of that, whatever the person named it, correct?

24 A Correct.

25 Q And that more or less is the original offer of whatever

1 started the download, correct?

2 A Correct.

3 Q So when you have these descriptive like PTHC, that could
4 have been in the contents downloaded itself, correct?

5 A Correct.

6 Q So it's not necessarily the individual who owns the computer
7 downloading, renaming the contents of that, correct?

8 A That is true.

9 MR. GORMAN: Could I have a moment, Your Honor?

10 THE COURT: Yes, sir.

11 MR. GORMAN: No further questions, Your Honor. Thank
12 you.

13 THE COURT: Anything further based on those questions?

14 MR. CAYTON: No, Your Honor.

15 THE COURT: You may step down. Thank you.

16 (Witness excused)

17 THE COURT: Government's next witness?

18 MR. GREENBAUM: Your Honor, the Government would like
19 to recall Special Agent Ferg.

20 THE COURT: Ferg? All right. Come up, sir. And you
21 remain under oath, of course.

22 MR. FERG: Yes, sir.

23 THE COURT: Have a seat. You may proceed whenever
24 you're ready.

25 MR. CAYTON: Thank you, Your Honor.

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1 DAVID FERG, GOVERNMENT'S WITNESS, PREVIOUSLY SWORN

2 DIRECT EXAMINATION

3 BY MR. CAYTON:

4 Q Special Agent Ferg, we talked yesterday about your receiving
5 videos or files that were downloaded by Special Agent Bonneau.

6 A Yes, sir. That's correct.

7 Q And you described a video involving a child male sitting on
8 the lap of an adult male?

9 A Yes, sir.

10 Q And yesterday we saw a video entitled Boy05. Do you
11 remember viewing that in court?

12 A Yes, sir.

13 Q Was that the file you were describing?

14 A Yes, sir.

15 Q And so, and you reviewed files that you received from
16 Special Agent Yanez --

17 A Yes, sir.

18 Q -- that were included in this case.

19 A Yes, sir. That's correct.

20 Q And you can confirm that that was the same video you
21 received at the beginning of the case for distribution?

22 A By all appearances, it appeared -- it seemed to me to be the
23 same video, yes.

24 Q And you asked Special Agent Yanez to run the list of videos
25 that you had seen that were downloaded by Agent Bonneau against

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1 the videos that were found in the forensic exam?

2 A Yes. I had asked Agent Yanez to do that.

3 Q And how many of those videos were present in the same
4 location? Or in other computers?

5 A He stated that he had found 15 of the 17 that I had asked
6 him to search for.

7 Q Now we also just saw a video titled Boy06.

8 A Yes, sir.

9 Q And you had watched that video previously?

10 A Yes I have, sir.

11 Q And it's a long video.

12 A Yes, sir, it is.

13 Q We saw a very -- it was kind of grainy. Would that be fair
14 to say?

15 A Yes, sir.

16 Q Could you describe a little bit more of what's in the video
17 if we would have continued watching it?

18 A Sir, based on what I had seen in the video, it appeared to
19 be a young boy under the age of 12 with his hands bound by rope.
20 He's nude, and at least two adult nude males are performing sex
21 acts on him.

22 Q All right. Is he orally -- or is he being forced to perform
23 oral copulation?

24 A Yes, sir.

25 Q Is he also anally penetrated?

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1 A Yes, sir.

2 MR. CAYTON: May I have just a moment, Your Honor?

3 THE COURT: Yes, sir.

4 (Pause)

5 MR. CAYTON: Pass the witness, Your Honor.

6 MS. BATALLER-SCHNEIDER: Your Honor, we have nothing
7 further for this witness.

8 THE COURT: You may step down. Thank you.

9 The Government's next witness?

10 MR. CAYTON: Sean Mullen, Your Honor.

11 THE COURT: Sean Mullen.

12 (Pause)

13 THE COURT: Is everybody okay? Anybody need a break?
14 I thought if you had too much coffee or something.

15 MR. CAYTON: May we approach, Your Honor?

16 THE COURT: Sure.

17 MR. CAYTON: Just walking around. Sorry, Judge.

18 THE COURT: It's okay.

19 MR. GREENBAUM: He wanted to do a dance.

20 THE COURT: He walking a pattern, wearing my carpet.

21 (Bench conference at 9:31 a.m.)

22 MR. GREENBAUM: I just wanted to --

23 THE COURT: Outside the presence of the jury. Yes,
24 sir.

25 MR. GREENBAUM: Yes, sir. This witness, it's been

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1 marked as Government's Exhibit Number 4. These are the known
2 victims. There should be two images. So we just cut it down to
3 two images that do anticipate playing here, Judge. So this is
4 what this witness is going to testify.

5 THE COURT: Images or videos?

6 MR. GREENBAUM: It's actually just images, Judge.

7 THE COURT: Oh.

8 MR. GREENBAUM: It was videos, but we cut it down to
9 just two images, Your Honor, from a known series, Your Honor. So
10 that's what I'm having him testify to. But I just wanted to
11 bring it to the Court's attention.

12 MR. GORMAN: I don't object to -- the only
13 (indiscernible), Your Honor, since it's a still frame. Keep it
14 up there for one or two seconds --

15 THE COURT: Okay.

16 MR. GORMAN: -- and then get it off because it's --

17 THE COURT: Yeah.

18 MR. GORMAN: Sure.

19 THE COURT: Listen, I've been watching. Rosemary's
20 pretty good.

21 MR. GORMAN: Yes.

22 THE COURT: Heavy finger, heavy hand to get those off.
23 That's good.

24 MR. GREENBAUM: Yes.

25 THE COURT: I know Kevin was telling her, she didn't --

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1 she was doing it. Thank y'all.

2 MR. GREENBAUM: Thank you, Judge.

3 MR. GORMAN: Oh, Your Honor, in terms of exhibit, I
4 think the question was they need reintroduce the exhibit. That's
5 your preference, Your Honor.

6 THE COURT: That's 40. Is it a separate exhibit?

7 MR. GORMAN: It's a snapshot of it. So yeah, I think
8 if it's put up there as a picture, so I think --

9 THE COURT: It's a snapshot of something that's already
10 been -- it's in evidence?

11 MR. GORMAN: That's my understanding. Yes, sir. It's
12 a frame of a video, Your Honor. Essentially an image.

13 MR. GREENBAUM: Yes.

14 THE COURT: You can go on up here, Mr. Mullen.

15 MR. CAYTON: I'm sorry, Your Honor.

16 THE COURT: It's all right. I just want to make sure
17 everybody's on the same page. So we've got two images coming in
18 as 40, you know, if they come in. And they're images taken from
19 I guess other videos that are already in evidence.

20 MR. GORMAN: That's correct, Your Honor.

21 MR. CAYTON: Yes.

22 THE COURT: Okay. And 41?

23 MR. CAYTON: They're in -- they're on the disc in 41.
24 They're the two videos I have not played. Part of the problem
25 is --

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1 THE COURT: Oh, I see.

2 MR. CAYTON: The compilation --

3 THE COURT: Because that one's a --

4 MR. CAYTON: Well, no. This one, it'll play but it's a
5 compilation video. Because we've been having trouble starting
6 the video in the middle, one of the victims, she's not seen
7 until, like, halfway through the video. And for him to see it
8 and confirm it, it was just easier to just do a screenshot and
9 put up the image. And it's also going to save having to play
10 part of the video, just do a quick screenshot and we can take it
11 down.

12 THE COURT: Okay.

13 MR. GORMAN: So it's a picture representing essentially
14 a frame from that moving picture.

15 MR. CAYTON: Correct.

16 THE COURT: Okay. It's actually already in evidence.

17 MR. CAYTON: But the exhibit itself is already in
18 evidence.

19 THE COURT: Okay.

20 MR. GORMAN: But for your records, Your Honor, I didn't
21 know if you want that offered as a separate exhibit because it's
22 a picture.

23 THE COURT: Well --

24 MR. CAYTON: We have --

25 THE COURT: I'm thinking --

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1 MR. GORMAN: I'm fine as-is.

2 THE COURT: Yeah. You can do it six different ways.

3 MR. CAYTON: Thank you, Your Honor.

4 (Bench conference ends at 9:34 a.m.)

5 THE COURT: Have you been sworn?

6 MR. MULLEN: No, I have not.

7 THE COURT: If you'd raise your right hand, please,
8 we'll have you sworn.

9 SEAN MULLEN, GOVERNMENT'S WITNESS, SWORN

10 THE CLERK: Thank you.

11 THE COURT: You may have a seat.

12 THE WITNESS: Thank you, sir.

13 THE COURT: Adjust the microphone.

14 Mr. Greenbaum, you may proceed whenever you're ready.

15 DIRECT EXAMINATION

16 BY MR. GREENBAUM:

17 Q Sir, can you introduce yourself to the jury, please?

18 A Sure. My name is Sean Mullen. I'm a Special Agent with the
19 Federal Bureau of Investigation.

20 Q Thank you, Special Agent. And can you spell out your last
21 name for the record?

22 A Sure. M-U-L-L-E-N.

23 Q Thank you, sir. And how long have you been a special agent
24 with FBI?

25 A Almost 18 and a half years now.

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1 Q Yes, sir. Can you tell us what your current assignments
2 are?

3 A Yes. I'm currently assigned to the Austin Resident Agency
4 in Austin, Texas.

5 Q And at that -- as part of your assignments, can you tell us
6 what are some of the things you do for the Austin Residency in
7 Texas?

8 A Yes. I transferred there in 2007 and began working crimes
9 against children cases. We call them violent crimes against
10 children. Initially it was the Innocent Images National
11 Initiative Program which is the online child exploitation cases.
12 I also work child abductions.

13 I'm a member of the child abduction rapid deployment team
14 for the FBI. Human trafficking, child sex trafficking primarily.
15 And then also assist in violent crimes and other technical
16 assistance to other squads in the RA.

17 Q And is there something called VCAC Unit that's in Austin,
18 Texas?

19 A Yes. That's the Violent Crimes Against Children squad in
20 Austin.

21 Q Okay. And did you have any duties and responsibilities with
22 that unit in Austin, Texas?

23 A I did. From 2007 until 2020, minus a year and a half where
24 I did a TDY in Washington, D.C., I was the Child Exploitation
25 Task Force coordinator. And my primary duties were leading that

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1 task force and conducting investigations on online job
2 exploitation cases.

3 Q Yes, sir. And what did you do at FBI headquarters in
4 Washington, D.C.?

5 A I was a supervisor special agent responsible for the
6 Innocent Images National Initiative program. My specific
7 responsibilities were providing support to the 13 field offices
8 in the Southeast United States and Puerto Rico, and also had
9 responsibility for our legal attache offices in Eastern Europe.

10 Q You may have touched a little bit on this, but can you tell
11 us some of your duties and responsibilities as program manager
12 for the FBI's National CE program?

13 A Well, the Innocent Images National Initiative program was
14 our Child Exploitation program. As part of those
15 responsibilities, any time a field office would need assistance
16 or a finance or just guidance or training, our job was to provide
17 that to them and assist them in any way possible.

18 Q And at times have you actually provided training for other
19 law enforcement entities?

20 A I have. I had the fortune of teaching twice at the
21 International Law Enforcement Academy in Budapest, Hungary,
22 teaching child pornography investigations to members of
23 approximately six countries in those two trips.

24 Q And I know we covered a little bit about this, but can you
25 tell us some of your training and experience as related to child

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1 exploitation investigations?

2 A Yes. I've received online undercover training, training in
3 interviewing, training in all the different platforms that are --
4 that the child exploitation material is traded on, some training
5 in digital forensics, as well.

6 Q Thank you, sir. Are you familiar with a child pornography
7 series known as cbaby?

8 A Yes, I am.

9 Q And what is this cbaby child pornography series?

10 A It is a series of videos and images that depict the sexual
11 exploitation or the sexual assault of four minor victims ranging
12 in ages from three to eight.

13 Q And can you describe to the jury how you're familiar with
14 this series, this cbaby series?

15 A Yes. I was the case agent on the investigation in Austin.

16 Q And it's involved four different children. Is that correct?

17 A That is correct.

18 Q And can you tell -- let me go back a little bit. When did
19 this alleged assault or child pornography series, the cbaby
20 series occur at?

21 A The sexual assault occurred from February of 1999 to
22 November of 2000.

23 Q And in regards to did you actually apprehend a person or
24 defendant in that case in regards to that cbaby series, and can
25 you tell us a little bit about that?

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1 A Yes, I did. In 2009, I was contacted by the Maine State
2 Police. Their Internet Crimes Against Children squad there, they
3 spent a lot of time looking at child pornography series that have
4 unknown victims. So through that, they analyzed the videos and
5 images from background, stuff in the background that would help
6 them locate where those victims are.

7 They had identified a novelty million dollar bill, and did
8 really good research, and determined that it was produced for a
9 specific event at the Star Ranch Nudist Camp in Bastrop County,
10 Texas. From that -- and this was a different series outside of
11 cbaby. We went out there and was able to identify that victim
12 who, through the investigation, then identified the cbaby victims
13 and the offender whose name was David Diehl.

14 Q Yes, sir. And was that Mr. Diehl subsequently at some point
15 arrested and convicted?

16 A Yes. He was arrested in April of 2010, convicted at trial
17 in February of 2011, and then sentenced to 50 years in federal
18 prison in October of 2011.

19 Q And the children that are depicted in this cbaby series, did
20 you determine what ages they were at the time that they were
21 created back in from February two thousand -- I'm sorry, 1999
22 through November of 2000?

23 A Yes. The victims, cbaby one would have been between the
24 ages of three and four depending on when exactly the abuse
25 occurred. Cbaby two, each victim has a cbaby one, two, three,

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1 four. That's how they delineate which one it is. Cbaby two
2 would have been eight. Cbaby three would have been eight. And
3 cbaby four would have been three to four years old, as well.

4 Q And when was the first time that this series, this cbaby
5 series of child pornography was actually seen or distributed to
6 the FBI's knowledge?

7 A To my knowledge, based on working with the National Center
8 for Missing and Exploited Children, it was first reported in late
9 2000 in the United Kingdom found it. And then they notified
10 through the International Center for Missing and Exploited
11 Children. They notified the National Center here in the United
12 States.

13 Q Yes, sir. And did you personally meet the victims in
14 regards to the children that are depicted in the cbaby series?

15 A I have, yes.

16 Q Okay. And did you confirm the ages at the -- let me ask
17 this. When did you meet those victims?

18 A I met those victims in 2010.

19 Q Okay. And what ages were they at that point in time?

20 A They would have been 14 and 19.

21 Q Okay.

22 A Eighteen, nineteen.

23 Q And once you confirmed these were the same individuals, what
24 were their ages again been back in 1999 or 2000?

25 A The youngest would have been between the ages of three and

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1 four or the ages of three and four throughout the abuse. And
2 then the older one was eight at the time.

3 Q Okay. Now yesterday you and I met, correct?

4 A That is correct, yes.

5 Q And we showed you I believe two images from that cbaby
6 series. Is that right?

7 A That was correct.

8 Q Did both those images, did they both fairly and accurately
9 depict the victims as they appeared during the time of the sexual
10 abuse back when these images were produced?

11 A Yes, it does.

12 Q Okay. And to the best of your recollection, is that a fair
13 and accurate depiction that of those two images from that cbaby
14 series?

15 A Yes, they are.

16 MR. GREENBAUM: At this time, Your Honor, Government
17 would move to admit Government's, I believe it's going to be
18 Government's Exhibit Number 40, the two images from the cbaby
19 series, Your Honor.

20 THE COURT: Mr. Gorman?

21 MR. GORMAN: No objection, Your Honor.

22 THE COURT: Government's Exhibit 40 is admitted without
23 objection.

24 (Government's Exhibit 40 admitted into evidence)

25 MR. GREENBAUM: Permission to publish.

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1 THE COURT: Yes, sir, you may.

2 MR. GREENBAUM: Rosemary, if you could just start with
3 the first image just for, like, one second, two seconds.

4 THE COURT: You want the other one, Mr. --

5 MR. GREENBAUM: Yes, Your Honor. Okay.

6 THE COURT: And so, Mr. Greenbaum, just for my
7 clarification, these are two images. They're actually already
8 admitted because they were on the videos that were admitted, just
9 not played?

10 MR. GREENBAUM: That's correct, Your Honor. We just
11 didn't play the whole video, Your Honor. They're just one --
12 they're two still images from those videos.

13 BY MR. GREENBAUM:

14 Q Sir, can you tell us, starting with the description of what
15 the first image is showing, sir?

16 A Yeah. The first image shows the defendant, Mr. Diehl, he
17 was forcing the three-year-old, baby one, to perform oral sex on
18 him. And then he ejaculated in her mouth.

19 Q And how old, again, was this child, sir?

20 A She would have been three or four at this time.

21 Q And this was the actual child that you actually met with
22 later on in life?

23 A That's correct. Yes.

24 Q Going to the second exhibit, can you explain to the jury
25 what that depicts?

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1 A Yes. That depicts cbaby two who was eight years old at the
2 time who was performing oral sex on Mr. Diehl.

3 Q Okay. And that's also a child that you met as well. Is
4 that correct?

5 A That is correct, yes.

6 Q And you confirmed that age as well. Is that right?

7 A Yes, I did.

8 Q Sir, have you had to testify in other jurisdictions
9 regarding this -- the identification of these children?

10 A Yes, I have.

11 Q And can you tell us what other jurisdictions that you had to
12 testify in regards to this cbaby series and these children?

13 A Yes. I've testified several times in the State of Texas,
14 State of Kansas, State of New York, Georgia, Alabama, Oklahoma,
15 and in Germany.

16 MR. GREENBAUM: If I may have just a brief moment, Your
17 Honor.

18 (Pause)

19 BY MR. GREENBAUM:

20 Q And, sir, we just saw basically a still of an actual video.
21 Is that correct?

22 A That is correct, yes.

23 Q So there's an actual longer video?

24 A Yes, there is.

25 Q And in regards to cbaby one, have you heard it referred to

1 as awesome preteen compilation number two?

2 A No, I've never heard of it with that name, no.

3 Q And for cbaby two, have you had it referred to as PTHC Kelly
4 8YO sucking and trying to "f", I'm not going to say the word.

5 A Yes, I've seen that file name before.

6 Q And that would be in regards to cbaby two. Is that right,
7 sir?

8 A It's cbaby two is an internet video when it was that file
9 name before. But it's a compilation video of a myriad of child
10 sexual abuse images and videos.

11 MR. GREENBAUM: Thank you, sir. I pass the witness.

12 THE COURT: Mr. Gorman?

13 MR. GORMAN: No questions, Your Honor.

14 THE COURT: Thank you. You may step down. Thank you.

15 (Witness excused)

16 THE COURT: Government's next witness?

17 MR. CAYTON: Your Honor, at this time, the Government
18 rests.

19 THE COURT: I'm sorry?

20 MR. CAYTON: The Government rests.

21 THE COURT: Thank you.

22 Ladies and gentlemen of the jury, the Government's
23 rested their case. That doesn't mean you've got the case yet for
24 deliberation. We've still got more to go. We're going to take a
25 short break. I've got some business I've got to take up. It's a

1 good time for our morning, midmorning break anyway. And y'all
2 can snack hopefully a little bit.

3 You're going to leave your notebooks here. Remember
4 your instructions. You're still not talking about the case. And
5 we'll have you back in here as soon as we can. Let's take 20
6 minutes. I know that's a little long. But if it were 10:30, I'd
7 be giving you that much time anyway.

8 Let's do that and then we can come back in a relatively
9 short time. I want to make sure that lawyers get a break as
10 well. And I want to make sure the judge gets a break. So let's
11 rise for the jury, please. We'll see y'all in just a little bit.
12 Thank y'all.

13 (Jury out at 9:48 a.m.)

14 THE COURT: All right. Please be seated. Outside the
15 presence of the jury. The Government having rested, does the
16 Defense have a motion?

17 MR. GORMAN: I'm sorry?

18 THE COURT: Does Defense have a motion?

19 MR. GORMAN: Oh, we do, Your Honor. Your Honor, at
20 this time we would like to move for a judgment of acquittal under
21 Rule 29 on all counts.

22 I would ask the Court to consider that the Government
23 has not presented sufficient evidence to determine all elements
24 beyond a reasonable doubt and, therefore, merit presentation of a
25 jury.

1 Specific to the distribution count, Your Honor, in
2 addition to this general presentation, I would ask the Court to
3 consider the evidence in this case involves a digital system.
4 Agent Bonneau testified this computer, he was a passenger of this
5 system. It generated information. He said the information
6 generated included internet information that was specific to the
7 transaction.

8 That's not in evidence, Your Honor, in terms of what
9 that presentation was documenting the actual internet address in
10 this case. That is the evidence of the address, Your Honor.

11 In terms of the video itself, there's been discussion
12 of the video name. But as Agent Yanez himself pointed out, names
13 aren't significant in terms of the contents of those videos. I
14 think what we just saw was Agent Ferg step up and attempt to say
15 by all appearance that could be the same video. He said it's
16 essentially a visual on it.

17 But Agent Yanez didn't offer testimony specific to the
18 video he received that was supposedly distributed that would
19 essentially establish that that video and the video on the
20 computer system in this case, and the evidence seized on this
21 case are the same video. So essentially we're left without that
22 evidence.

23 And with that, Your Honor, I don't know what the jury
24 would be basing it on other than essentially items that would not
25 be considered the best evidence or even competent evidence of the

1 contents of that information. I would ask the Court to consider
2 that does support a judgment of acquittal on that count.

3 THE COURT: Thank you, Mr. Gorman.

4 MR. GORMAN: Thank you, Your Honor.

5 THE COURT: Does Government have a response?

6 And you can, Mr. Gorman, you're specifically speaking
7 of Count 1, the distribution count?

8 MR. GORMAN: That would be correct. It's a general --
9 obviously a general --

10 THE COURT: Sure.

11 MR. GORMAN: Thank you, Your Honor.

12 MR. CAYTON: And, Your Honor, in regards to the
13 general, the Government believes we have proven each and every
14 element beyond a reasonable doubt at this point. The defendant
15 was in possession of multiple devices in this case, eight
16 different devices. All of them possessed child pornography.

17 He knowingly possessed all of the child pornography.
18 He discussed with the special agents the fact that he knowingly
19 possessed that child pornography. He specifically searched
20 specific search terms. He was very coy with the initial
21 interview. At the second interview, he was a lot more specific
22 on the search terms.

23 And Agent Yanez also testified to several search terms
24 that he found that were specifically looking for child
25 pornography. And obviously, based upon what we have previewed in

1 court, we know it is in fact child pornography. Agent Yanez also
2 testified regarding the manufacture location of all of those hard
3 drives. All of them involved interstate commerce. They all came
4 from outside of the country.

5 In regard specifically to the distribution count, the
6 internet address was discussed where it came from. Agent Ferg
7 testified that he received the videos that were sent from Agent
8 Bonneau that he reviewed all 17 videos. And then he also
9 testified that those videos were found on the defendant's
10 devices, 15 of them were found on the defendant's devices.

11 And one in particular was played here in court, and he
12 confirmed that it was the same video or substantially the same
13 video. But he did see the video that came from the distribution.
14 The fact that 15 out of 17 files were found on the defendant's
15 devices that had been downloaded from the defendant is clear that
16 the defendant was distributing and sharing.

17 The defendant tried to deny that he was sharing his own
18 files, but he did admit that the system was set up to share,
19 specifically saying multiple times I should have turned off that
20 feature. He knowingly knew he was sharing. And as Agent Yanez
21 also testified, the defendant was not passenger. Agent Bonneau
22 was a passenger.

23 The defendant was -- I'm sorry, I think it was Agent
24 Bonneau's testimony. The defendant was the driver. He was the
25 one in control of what his computer was doing and what his

1 computer was sharing, which allowed Agent Bonneau to get the
2 downloads.

3 THE COURT: Thank you.

4 The Court, reviewing the evidence in the light most
5 favorable to the Government, and taking all inferences in favor
6 of the Government, and resolving all issues of credibility in
7 favor of the Government, which is the standard of proof required
8 in a Rule 29 motion at this time finds that a reasonable and
9 rational juror could find the defendant guilty of each of the
10 counts beyond a reasonable doubt of each of the elements set
11 forth in the indictment and respectfully denies the motion.

12 Mr. Perkins, if you and your counsel would come up to
13 the podium for me real quick. We'll get this very quickly. You
14 are -- I'm going to get you on the microphone. So, Mr. Gorman,
15 would you pull the mic? There you go.

16 So you're Thomas Scott Perkins, correct?

17 THE DEFENDANT: Yes.

18 THE COURT: You're the defendant in this case, and
19 you've been here for the entire trial, right?

20 THE DEFENDANT: Yes.

21 THE COURT: Just as you have the right to do. Every
22 criminal defendant, Mr. Perkins, is privileged to testify in his
23 own defense. Even though you have competent counsel, I advise
24 you that the law provides that you as the accused in this case do
25 not have to testify.

1 If you choose not to testify, no one can or will hold
2 it against you. Likewise, you have a right to testify and no one
3 can keep you from testifying if you want to do that. Do you
4 understand?

5 THE DEFENDANT: Yes.

6 THE COURT: Okay. And if you choose to testify, the
7 Government's allowed to cross-examine you just the same as any
8 other witness, of course, just like you've seen that happen over
9 the past day or so. Do you understand that?

10 THE DEFENDANT: Yes.

11 THE COURT: If you have previous convictions in the
12 nature of a felony of misdemeanor involving oral turpitude that's
13 not remote, the Government would be entitled to ask you about
14 those convictions and in effect disclose the convictions to the
15 jury. Do you understand?

16 THE DEFENDANT: Yes.

17 THE COURT: If in the event that you choose to testify
18 and you have previous convictions that are made known to the
19 jury, I'll instruct the jury they're not to consider those
20 convictions for any purpose except as they may bear on your
21 credibility as a witness. Do you understand that, sir?

22 THE DEFENDANT: Yes.

23 THE COURT: Likewise, you have the right to remain
24 silent. In other words, you do not have to testify if you don't
25 want to. If you choose to remain silent, the Government cannot

1 make you testify. They cannot call you as a witness or in any
2 way force you to bear witness against yourself, nor can they do
3 anything to call upon you to account for your failure to testify.
4 Do you understand?

5 THE DEFENDANT: Yes.

6 THE COURT: Now if you choose not to testify, I'll
7 instruct the jury that they cannot use that against you in any
8 way, and they cannot speculate as to why you did not testify or
9 what you might have said had you chosen to do so. Do you
10 understand?

11 THE DEFENDANT: Yes.

12 THE COURT: Now having gone over this right with you,
13 do you have any questions concerning your right to testify or
14 remain silent? Any question for me? If you have questions for
15 your attorneys, certainly you can do that privately. But if you
16 have questions for me, that's what I'm asking you.

17 THE DEFENDANT: No.

18 THE COURT: No, you're good? Okay, thank you. You may
19 return to your seat, sir. Thank you.

20 Mr. Gorman, Ms. Bataller, I want us all to take a
21 break. But once we bring him back in, you're -- if you have
22 whatever witness you're going to call first up here, we'll get
23 going, okay? And let's come back at ten after.

24 MR. GORMAN: And, Your Honor, housekeeping question
25 just because I discussed this with the Government. I think the

1 parents are in the sensory deprivation tank next door. We're not
2 going to use them as witnesses. The conference room.

3 THE COURT: Mr. Perkins --

4 MR. GORMAN: Yeah, his parents. They were on the
5 witness list for both. The Government was going to call them.
6 We're not going to call them. Would it be okay if they --

7 THE COURT: Any objection to them coming back in?

8 MR. GREENBAUM: No, Judge. And that's what I was --

9 THE COURT: As long as they'll sit in the second row
10 back. And it's not the first row. So the copy room is the
11 sensory deprivation room?

12 MR. GORMAN: I need to --

13 MS. BATALLER-SCHNEIDER: That's what he calls it.

14 MR. GORMAN: I was just pointing out the walls, there's
15 no noise, TV, or otherwise. Yeah, I could see that. So yes, I
16 think they'll be happy to be liberated, Your Honor.

17 THE COURT: I have no problem with that.

18 MR. GORMAN: Thank you.

19 THE COURT: Let's come back at ten after and we'll get
20 rolling, okay?

21 MR. CAYTON: Your Honor, is it okay if I retrieve the
22 exhibits?

23 THE COURT: Oh, sure.

24 MR. CAYTON: I accidentally left them.

25 THE COURT: Yeah, whatever you need.

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1 (Recess at 9:57 a.m./Reconvened at 10:26 a.m.)

2 (Outside the presence of the jury; defendant present)

3 THE CLERK: All rise.

4 THE COURT: You can come on up here. You can stand
5 there. All right. Government, anything before we --

6 MR. GREENBAUM: No, Your Honor.

7 THE COURT: -- bring the jury in?

8 MS. BATALLER-SCHNEIDER: No, Your Honor.

9 THE COURT: All right. So we'll all bring in everybody
10 else, have everybody sit down. You stay standing though, please.
11 And I'll ask, who's going to -- Ms. Bataller?

12 MS. BATALLER-SCHNEIDER: I will be, Your Honor.

13 THE COURT: I'll ask her who her first witness is, and
14 then we'll have you sworn once she announces your name. Okay?

15 DR. SCHUTTE: Understood, Judge.

16 THE COURT: Very good. Let's bring the jury in,
17 please.

18 (Jury in at 10:27 a.m.)

19 THE COURT: All right. Let's be seated, please. Thank
20 you. Ms. Bataller, your first witness, please?

21 MS. BATALLER-SCHNEIDER: Yes, Your Honor. The Defense
22 calls Dr. James Schutte.

23 THE COURT: Dr. Schutte, if you'd raise your right hand
24 please to be sworn.

25 JAMES SCHUTTE, DEFENDANT'S WITNESS, SWORN

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1 THE CLERK: Thank you.

2 THE COURT: You can have a seat ad adjust yourself to
3 that microphone. Ms. Bataller, you may examine him whenever
4 you're ready.

5 MS. BATALLER-SCHNEIDER: Thank you.

6 DIRECT EXAMINATION

7 BY MS. BATALLER-SCHNEIDER:

8 Q Good morning, Dr. Schutte. Can you please state your name
9 for the record and spell your last name?

10 A Certainly. It's James William Schutte, S-C-H-U-T-T-E, Ph.D.

11 Q And where are you from?

12 A Originally from Pennsylvania, but I've lived more than half
13 of my life in El Paso, Texas.

14 Q And is that where you currently live?

15 A Yes, it is.

16 Q What do you do for work?

17 A I'm a licensed psychologist.

18 Q Do you work for the federal government?

19 A No, I'm not an employee of the federal government.

20 Q Are you an employee of my office?

21 A No, I'm not.

22 Q Where do you work?

23 A I have my own private practice over by Basset Center Mall in
24 El Paso, Texas. And I've been there for more than 20 years.

25 Q Do you have an undergraduate degree?

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1 A Yes, I do.

2 Q And where did you get that from?

3 A I got my undergraduate degree in psychology from Brigham
4 Young University.

5 Q And when was that?

6 A That was in 1992.

7 Q And do you have a graduate degree?

8 A Yes, I have two of them.

9 Q Where did you get those from?

10 A From the University of Texas at El Paso.

11 Q And when did you get those?

12 A I got my masters degree in psychology in 1994, and my
13 doctorate degree in psychology in 1996.

14 Q Are you licensed as a psychologist?

15 A Yes. I'm licensed in the State of Texas, and also in the
16 State of New Mexico. And I do work in both states.

17 Q How long have you been licensed as a psychologist?

18 A I got licensed at the pre-independent level starting in
19 1995. And my first independent licensure was in 1999.

20 Q And since you became licensed, or since school actually, can
21 you tell us what you've done professionally?

22 A Certainly. I have a board certification in psychometry
23 which is psychological testing from the Board of Certified
24 Psychometrists. I have my private practice in which I do
25 evaluations or psychological assessments for different government

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1 agencies such as Social Security Disability, Child Protective
2 Services, Local Community and Mental Health Center which is
3 Emergence Health Network.

4 I do evaluations for the Texas Workforce Commission, for the
5 University of Texas at El Paso Police Department, for the Diocese
6 of El Paso for individuals seeking to become priests to rule out
7 issues of pedophilia or sexual abuse tendencies or other mental
8 health issues. I also do evaluations for the El Paso County
9 Attorney, as I mentioned, Child Protective Services, the family
10 courts in El Paso.

11 I do evaluations of juvenile offenders to determine issues
12 of essentially insanity or competency. I also do evaluations for
13 state and federal courts. And I testify on a regular basis in El
14 Paso, Texas.

15 Q And you said that you testified before in federal courts.
16 About how often have you done that?

17 A About five times, I believe.

18 Q And have you published anything to do with your psychology
19 degree?

20 A Yes, I have.

21 Q Do you specifically focus on Autism Spectrum disorders in
22 your work?

23 A That's a frequent area of assessment that we do. I see
24 individuals for autism assessments basically on a daily basis in
25 my office. These are the individuals who are referred by

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1 pediatricians, bu the local school districts, sometimes by our
2 community mental health center or one of the psychiatric
3 hospitals in town. They'll send either a child or an adult over
4 to see if this person has autism spectrum disorder.

5 I also often see individuals with Autism Spectrum disorder
6 for Social Security Disability evaluations, and also for
7 vocational assessments. Also, oftentimes juvenile offenders that
8 I assess for the 65th District Court in El Paso have Autism
9 Spectrum disorder. So that's a condition I come across very
10 often in my practice.

11 Q And do you also specifically focus on psychiatric disorders
12 such as schizophrenia and schizoaffective disorder?

13 A Those are very common conditions that I see in my practice,
14 and primarily through assessments for Social Security Disability,
15 but also for individuals referred by the Courts who are sent to
16 me through the courts, or from the El Paso Psychiatric Center, or
17 Emergence Health Network.

18 Q Have you had an opportunity to meet with Thomas Perkins in
19 your professional capacity?

20 A Yes, I have.

21 Q And when was that?

22 A That was on September 4th, 2021.

23 MS. BATALLER-SCHNEIDER: Your Honor, at this time, we'd
24 move to have Dr. Schutte deemed an expert or qualified as an
25 expert.

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1 MR. GREENBAUM: No objection, Your Honor.

2 THE COURT: The Court so finds.

3 BY MS. BATALLER-SCHNEIDER:

4 Q And before you met with Thomas, what did you review?

5 A I reviewed a prior psychological assessment that had been
6 done at the Federal Medical Center. And that gave a description
7 of his history, medical history, prior diagnoses that he
8 received. It had some test results in there, and a diagnosis at
9 the end.

10 Q And what were those prior diagnoses that you saw?

11 A There was diagnoses including schizoaffective disorder.
12 There was a mention of a history of autism, and a final diagnosis
13 of Autism Spectrum Disorder.

14 Q And after you met with Thomas, what did you personally
15 believe that he should be diagnosed with?

16 A I believe he has a number of diagnoses, most important ones
17 being Schizoaffective Disorder, Bipolar Type, and Autism Spectrum
18 Disorder.

19 Q Now when you say Autism Spectrum Disorder, can you explain
20 to the jury what that is?

21 A Certainly. It's the current term we use to describe autism.
22 It also describes other terms that have been used in the past
23 such as Asperger's disorder. Autism Spectrum Disorder is a
24 lifelong developmental condition in which an individual has
25 problems developing and maintaining social relationships.

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1 They have difficulty interacting socially with others. For
2 example, their speech may be odd or unusual. They have trouble
3 maintaining eye contact or understanding social cues. So they
4 tend to be awkward in social interactions.

5 They also tend to exhibit a number of unusual behaviors such
6 as oftentimes being fascinated or fixated on one topic to the
7 exclusion of others. They may become fascinated with parts of
8 objects or parts of ideas to the exclusion of others.

9 They may engage in unusual motor or body movements such as
10 walking back and forth or flapping their hands. And so it's a
11 lifelong condition which impairs a person's -- basically their
12 ability to socialize and relate to others.

13 Q Thank you. What did you see specifically in Thomas that
14 made you diagnose him with Autism Spectrum Disorder?

15 A Well, aside from the fact that that diagnosis had been made
16 previously by another professional, I observed a number of
17 autistic behaviors in my interaction with him. His eye contact
18 was poor. In other words, he didn't hold my gaze. His speech
19 was very monotone. Generally, when we speak we tend to show a
20 change in emotion depending on the topic we're talking about, and
21 his emotion was very flat.

22 His affect or his overall emotional presentation was very
23 constricted or flat, as well. He had difficulty keeping on
24 topic, and oftentimes I had to redirect him back to what we were
25 talking about because he would start talking about something

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1 else, or even give sometimes an irrelevant answer to the question
2 I had.

3 His descriptions of some of his behaviors and the things
4 that he's done in the past such as being fixated on an idea that
5 he wanted to research, or being fascinated with one aspect of
6 something were all consistent with Autism Spectrum Disorder.

7 Q Did you do any tests on Thomas?

8 A I did.

9 Q Which tests did you do?

10 A I did a number of them. The first one was the REY 15 items
11 test. This is essentially a test to check if someone is trying
12 to fake memory problems. Our concern oftentimes is
13 psychologists, when we evaluate people in the criminal justice
14 system, is we want to see if they're being open and honest with
15 us when they're describing their problems.

16 Sometimes in certain settings, there can be a motivation to
17 fake something you don't have, or exaggerate a condition that you
18 do have. And so I wanted to administer some tests to rule out
19 that possibility to make sure that he was being up-front with me
20 when he was describing the issues that he has. And on that test,
21 there was no indication that he was trying to fake a memory
22 problem.

23 Q And if I could just sort of follow up on that. As far as
24 what you reviewed, have you seen any evidence that any doctor has
25 ever found that Thomas is making these symptoms up or what you

1 might call malingering?

2 A No. He's been administered numerous tests by different
3 proccessionals, and there's never been any indication that he was
4 trying to fabricate or malingering or fake or exaggerate his
5 problems.

6 Q Were any of the tests that you did that stood out to you as
7 far as the significance for Autism Spectrum Disorder?

8 A Certainly. One of the tests I administered is called the
9 SRS-2, or the Social Responsiveness Scale, Second Edition.
10 That's a test which measures different characteristics of autism.
11 And his responses to that test were consistent with a diagnosis
12 of Autism Spectrum Disorder.

13 So to me as a psychologist, it's not just what I'm observing
14 which is of course part of the evaluation. It's not just what
15 I've read that other professions that I've seen, but also I have
16 another source of information which are these objective tests.
17 And these are all consistent in telling me that this is a person
18 with Autism Spectrum Disorder.

19 Q And what did you find about those tests that made you
20 believe that he was -- that it was consistent with Autism
21 Spectrum Disorder?

22 A His responses to the SRS-2. There was also some other
23 psychological testing that I did. And his responses to those
24 measures as well were consistent with autism.

25 Q And when you're doing these tests, is there a scale that you

1 look at as far as whether someone performs low on the scale or
2 high on the scale as far as ability?

3 A Sure. As far as ability, there is intelligence testing.
4 There's also neuropsychological testing where we can see how a
5 person's functioning in different areas of cognition such as
6 their memory or their language skills or their verbal fluency.

7 Q Did Mr. --

8 A When they create these tests, they give them to a group of
9 normal people to see how normal people answer these questions, or
10 how many correct answers the average person can provide. Someone
11 who is missing a lot of items or is endorsing a lot of symptoms,
12 those can be considered an abnormal performance. And so that's
13 an indication that there's something abnormal in this person
14 because they're not responding like the average person does.

15 Q Did Thomas score below average on any of these tests?

16 A He did.

17 Q And can you tell me which tests those are?

18 A One is the COWA which is the Controlled Oral Word
19 Association. This is a measure of verbal fluency and verbal
20 problem solving. And he scored in the severely impaired range on
21 that measure.

22 Also there's the Neuropsychological Assessment Battery, the
23 judgment sub-test which is a measure of social judgment and
24 social intelligence. And he scored in the mildly to moderately
25 impaired range on those measures.

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1 Q Thank you. Now I want to turn to the other diagnosis of
2 schizoaffective disorder. Can you tell the jury what that is?

3 A Schizoaffective disorder is a combination of two mental
4 health conditions, the first being schizophrenia and the other
5 being a mood disorder which can be depression or bipolar
6 disorder.

7 Taking those one-by-one, schizophrenia is a severe mental
8 illness in which a person loses contact with reality. They
9 oftentimes experience what we call hallucinations which means
10 that they hear things that aren't there, usually voices. They
11 may see things which are not there. They may smell or feel
12 things that are not actually there.

13 Oftentimes, people with a schizophrenia disorder experience
14 delusions which means they have irrational and very unusual ideas
15 about things such as feeling that they're being watched or
16 they're being followed, or thinking that they're being monitored
17 through their television, or that they have special powers, or
18 that they have greater importance, they're actually a famous
19 person with more importance than they actually have.

20 So it's this combination of delusions and hallucinations
21 which causes someone to have a schizophrenia-type diagnosis.

22 On the other hand, in order to have schizoaffective disorder
23 you have to have a mood disorder which can be depression which
24 are things like fatigue, suicidal ideation, low motivation, sleep
25 problems, or it can also be bipolar disorder where you have what

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1 we used to call mood swings where you go from being depressed to
2 being very happy, very energetic, very irritable oftentimes to
3 the point of needing to be hospitalized. So that's what
4 schizoaffective disorder is.

5 Q And you said that you specifically diagnosed Thomas with
6 schizoaffective disorder. What sort of things did you see in
7 Thomas that made you believe that was the correct diagnosis?

8 A Well, not just the prior psychological evaluation, but also
9 his reported history of mood disturbance and irritability
10 including being hospitalized for that. He described
11 hallucinations and delusions in the form of hearing angels,
12 feeling that there is a sex demon, a female sex demon which comes
13 and has sexual intercourse with him.

14 These beings that he hears and perceives and sees he feels
15 are going to influence his legal case. He feels that they have
16 provided him with information on how to behave in his life such
17 as whether to take a COVID vaccine or not.

18 And so that combination of those delusions and
19 hallucinations combined with this mood disorder are what justify
20 a diagnosis of schizoaffective disorder.

21 Q Thank you. Now you touched on this a little bit, but would
22 hearing voices and believing or actually feeling a sex demon have
23 any effect on Thomas' ability to perceive reality?

24 A Certainly.

25 Q How so?

1 A Because schizophrenia is a detachment or a break from
2 reality, you know, we are in touch with reality because of what
3 we sense, what we see, what we hear, what we touch and also what
4 we think about the world. And if we have a severe mental illness
5 that impairs our ability to understand what's really going on in
6 the world, that can certainly have an impact on our behavior.

7 Oftentimes, people with a schizophrenic or psychotic
8 disorder act in very unusual ways because of voices that they
9 hear, things that they see, or odd ideas that they have in their
10 head. And so they're not thinking clearly or rationally when
11 they engage in certain behavior.

12 Q Now I want to turn to Autism Spectrum Disorder again. Is it
13 easy for your average person to tell if someone has ASD just by
14 watching them?

15 A Well, there's certainly levels of ASD, level one, two, and
16 three. And some of level three Autism Spectrum Disorder, this
17 may be an individual who doesn't speak at all, who sits in the
18 corner and rocks back and forth or flaps his or her hands. And
19 in those cases it would be very easy perhaps for the average
20 person to say well that person obviously has something wrong with
21 them. And if the average person knows a little bit about autism,
22 they might be able to say okay, well this is a person who may be
23 autistic.

24 With other levels of autism, say level one or level two, it
25 would be very difficult for the average person to identify this

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1 person as having that characteristic because again, these people
2 are generally able to speak but their speech is a little odd. So
3 you'd have to talk with them for an extended period of time.

4 Their emotions are constricted. They talk in a monotone.
5 They have unusual eye contact or unusual interests. And so
6 that's not something that would be readily identifiable by the
7 average person. It would require a professional.

8 Q And as you said, does that change the fact that they still
9 have an inability to interact with others the way that your
10 neurotypical person would?

11 A Yeah, that still means that they have an impaired ability to
12 interact with others. Their social skills are still impaired.
13 It's just not readily observable to the average person who's not
14 trained in psychology or psychiatry.

15 Q And in your experience with people with ASD, what do these
16 -- what kind of problems are caused by a person with ASD maybe
17 having a more subtle version of it but still having these
18 difficulties in interacting with others?

19 A Those individuals tend to have very few if any friends, very
20 few if any romantic relationships. They may be uninterested in
21 having relationships with others. They may have an interest in
22 having relationships with others but they're very anxious about
23 interacting with people. And so they tend to be more solitary.

24 When they do interact with people, they may perceive
25 rejection because of their unusual behavior. And so they don't

1 have the opportunity to develop the kinds of friendships or
2 social relationships or romantic or sexual relationships that the
3 average person does. And it's in having these relationships and
4 maintaining them, as all of us grow up, that we learn how to
5 interact with others. That's how we learn our social skills,
6 through trial and error.

7 If we go and behave in a certain way at a party and people
8 respond positively to that, then we get good feedback. If people
9 respond negatively to what we do, then the average person will
10 say okay, I need to change what I say or how I dress or how my
11 mannerisms are. And individuals with autism have a great deal of
12 difficulty with that.

13 Q And I want to touch specifically on sexuality related to
14 what you just testified to. Do you find that people with Autism
15 Spectrum Disorder are able to explore their sexuality like a
16 neurotypical person would?

17 A They have a great deal of difficulty, again for the same
18 reasons I just mentioned. They may have a lack of interest in
19 sexual relationships, or may be very anxious about approaching
20 someone to start a romantic or sexual relationship. Again,
21 there's oftentimes a lot of rejection that they experience
22 growing up because of their unusual behavior. And they don't
23 have the opportunity to develop those normal and healthy
24 relationships that most of us have.

25 Q As far as you're aware, was Thomas ever able to explore his

1 sexuality with anyone?

2 A No.

3 Q As far as you're aware, has he ever even kissed anyone?

4 A No.

5 Q I'm turning to a different aspect of ASD. Is it an aspect
6 of ASD for someone with that disorder to be brutally honest?

7 A Yes.

8 Q And why is that?

9 A One of the aspects of Autism Spectrum Disorder is a lack of
10 awareness of social norms, social rules, how to behave in social
11 settings. And so it's not uncommon for individuals with autism
12 to simply say what's on their mind without realizing that that's
13 not always an appropriate thing to do.

14 A typical example would be going to a party and telling
15 someone that they look ugly in that dress, or that they don't
16 like their haircut. Now that may be completely accurate, but
17 that's not something that's socially appropriate.

18 And individuals with Autism Spectrum Disorder may focus on
19 the telling the truth part without appreciating the fact that
20 it's not always socially acceptable to tell the truth in every
21 setting. And so that's an area in which they struggle.

22 Q And before testifying today, you were able to view or listen
23 to the interrogation of Thomas by Agents Ferg and Butler. Is
24 that right?

25 A That's correct.

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1 Q And do you think, after viewing that, that Autism Spectrum
2 Disorder played a role in that interaction?

3 A Certainly.

4 Q And how so?

5 A Well, I observed the same characteristics of Autism Spectrum
6 Disorder in that interview as I did in my own evaluation of him.
7 Again, this monotone speech, this flat affect, this obsessive
8 preoccupation with certain ideas. There's certainly some
9 indication of difficulty following directions and following a
10 course of thought during the interrogation. And so that's very
11 consistent with that diagnosis.

12 Q Do you think it would have been a different situation if the
13 agents had been trained to speak with people with Autism Spectrum
14 Disorder or schizophrenia?

15 A It's possible.

16 Q Now I want to talk about the idea of people with ASD
17 parroting ideas. Can you explain to the jury what that is?

18 A Oftentimes, individuals with Autism Spectrum Disorder have
19 difficulty grasping the reasons behind social behaviors. And so
20 they may simply repeat things that they've heard or things that
21 they've seen on TV without understanding the reason for them.
22 And that can oftentimes cause them difficulty in social settings.

23 Q Do you see any evidence of that in the interrogation that
24 you reviewed?

25 A Certainly. I mean, individuals with autism tend to be what

1 we call suggestible, subject to being influenced or directed by
2 those around him. And I certainly observed that, as well.

3 Q Is it a common aspect of ASD to get frustrated easily in
4 social situations?

5 A Yes.

6 Q And why is that?

7 A Individuals with Autism Spectrum Disorder, again because of
8 their limited social skills, tend to get very frustrated when
9 having to deal with others. They also tend to get very
10 frustrated if their routine is disturbed. They like to do things
11 in a certain pattern day after day. And if there's some change
12 in their schedule or change in their routine, they tend to get
13 agitated by that.

14 Again, it's the fact that they like predictability. They
15 like to do the same thing over and over again because it gives
16 them some reassurance that they know how the world is going to
17 turn out. So they like things to be the same.

18 Q Now because of their deficits in social understanding, are
19 people with ASD naturally able to understand right and wrong in
20 social situations?

21 A In social situations, they're going to have a great deal of
22 difficulty with that. Again, they may observe how people
23 interact, you know, from a distance or possibly on TV or in
24 movies. But they have difficulty understanding why certain
25 behaviors are inappropriate in certain settings. And they might

1 seize on one simple idea such as well always tell the truth when
2 people ask how they look without understanding why that's not
3 always a good idea.

4 Q Did you see any evidence of that happening in the social
5 situation that was the interrogation?

6 A Yeah, I think certainly there was an eagerness to argue the
7 same idea over and over again without really responding to the
8 change in the question. I also observed difficulty following
9 instructions during the interrogation.

10 Q And moving on to a different aspect of ASD, you touched on
11 this briefly about collecting and maybe in an obsessive way. Can
12 you talk about that a little bit more in the context of ASD?

13 A Certainly. It's a frequent characteristic of people with
14 Autism Spectrum Disorder that they like to collect things. As
15 children they often collect, you know, toy cars or inanimate
16 objects such as pieces of string or rocks or dirt, or even pieces
17 of trash.

18 And they like to organize them in certain fashion such as
19 lining them up by size or by color, or by some other
20 characteristic. And they get very upset when their collection is
21 disturbed.

22 That abnormal fixation with an idea or with an activity is
23 seen also in adults with Autism Spectrum Disorder where they may
24 collect things for no apparent reason other than the fact that
25 they want to have a collection of something, and they want to

1 organize it by some characteristic.

2 You know, we can certainly understand individuals who may
3 want to collect coins or stamps or antique cars. But individuals
4 with autism will often collect things that seem to be of no value
5 to the average person.

6 Q And does this collection always represent an obsession with
7 the subject matter of what they're collecting?

8 A Not always. They can certainly be collecting for the sake
9 of collecting something. It becomes a repetitive behavior. Like
10 I mentioned earlier some individuals with autism may walk back
11 and forth or, you know, flap their hands because it soothes them
12 in some way.

13 By the same measure, individuals with autism may collect
14 items because it reduces their anxiety, not because they have
15 some sort of interest in, you know, collecting pieces of trash or
16 string or whatever they're collecting. It becomes a repetitive
17 behavior sort of detached from the subject matter.

18 Q Do you have any thoughts on the part of the interrogation
19 where Thomas talked about doing research, Supreme Court research?
20 Do you have any thoughts on that?

21 A Yeah. I know there were several mentions that he made of
22 experimentation or doing research based on what he interpreted
23 the Supreme Court as having said.

24 Q And do you think that's informed in any way by his Autism
25 Spectrum Disorder or schizophrenia?

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1 A Certainly it is, yes. I mentioned earlier, individuals with
2 Autism Spectrum Disorder often develop unusual fixations with
3 things or with ideas without seeing the entire picture. And so
4 it's not unreasonable to see that an individual with autism may
5 decide to do experiments or do research which involves a lot of
6 repetitive behavior such as collecting a large amount of material
7 and looking for some characteristic in it which is not readily
8 important to the average person. So that's very consistent with
9 autism.

10 Q And with the social deficits that people with ASD have,
11 would they be able to understand the feelings of the children in
12 those videos just by looking at their faces and seeing facial
13 expressions?

14 A No. Individuals with Autism Spectrum Disorder have a great
15 deal of difficulty interpreting emotional expressions from facial
16 expressions. And so that's not something I would expect the
17 average person with autism to be able to do.

18 Q Would you expect Thomas to be able to do that?

19 A No.

20 Q With Thomas' ASD symptoms and his schizoaffective disorder
21 framing his reality as you've testified to, do you believe he
22 could knowingly possess or distribute child pornography as the
23 Government alleges?

24 MR. GREENBAUM: Judge, I have an objection to that. We
25 had --

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1 THE COURT: Sustained.

2 MR. GREENBAUM: -- pretrial hearings on this.

3 THE COURT: Sustained.

4 MS. BATALLER-SCHNEIDER: Your Honor, if we could
5 approach, please?

6 THE COURT: Sure.

7 MS. BATALLER-SCHNEIDER: Thank you.

8 (Bench conference at 10:59 a.m.)

9 THE COURT: Outside the presence of the jury.

10 MS. BATALLER-SCHNEIDER: So I was --

11 THE COURT: How does that not invade the province of
12 the jury.

13 MS. BATALLER-SCHNEIDER: That I understand.

14 THE COURT: Is the ultimate issue.

15 MS. BATALLER-SCHNEIDER: We did put in notice --

16 THE COURT: Softer.

17 MS. BATALLER-SCHNEIDER: I apologize. We did put in
18 notice of a 12.2(b) argument that we would be trying to negate
19 the mens rea by through psychological evidence. In the notes of
20 that, and we put this in our motion, the notes of that, that is
21 one area where you can get to the final issue.

22 Now as far as I'm not going to be asking anything about
23 the final issue of insanity.

24 THE COURT: You just asked him if he felt like he could
25 do it as been charged, that he could do it.

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1 MS. BATALLER-SCHNEIDER: That he could knowingly.

2 THE COURT: Mr. --

3 MR. GREENBAUM: Judge, it's clear 704(b), Your Honor.
4 That's going to the ultimate issue. That's for the trier of fact
5 to decide, Your Honor, not for an expert to decide. It's clearly
6 codified in that statute, Your Honor, which we brought up in
7 pretrial, Judge.

8 MS. BATALLER-SCHNEIDER: But just to be clear, 704(b)
9 does not apply to 12.2(b).

10 THE COURT: So you're saying that when their expert
11 comes in tomorrow and says (indiscernible), you're not objecting
12 to that. There's no problem with him answering that.

13 MS. BATALLER-SCHNEIDER: I would have to look at the
14 12.2(b) statute to know exactly whether that's just for the
15 person offering the evidence. But I would imagine it would be
16 the same for both parties.

17 (Bench conference ends at 11:00 a.m.)

18 THE COURT: Can we have the jury -- I'm going to have
19 y'all step out for a few minutes, let me talk to the lawyers
20 alone. Remember your instructions. You'll leave your notebooks
21 here. We'll see you all back here in a few minutes. Thank you.

22 Let's rise for the jury, please.

23 (Jury out at 11:00 a.m.)

24 THE COURT: Y'all go ahead and go back.

25 MS. BATALLER-SCHNEIDER: Okay, thank you.

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1 THE COURT: We'll discuss it.

2 MS. BATALLER-SCHNEIDER: Okay. Thank you so much.

3 THE COURT: Let's be seated, please. And you can sit
4 down in the gallery if you'd like, Dr. Schutte, for a few
5 minutes. Take a break.

6 All right. So, Ms. Bataller, tell me where your -- you
7 gave notice on what document? What's the document number? Let
8 me pull it up.

9 MS. BATALLER-SCHNEIDER: I'm looking right now at
10 Document 136.

11 THE COURT: 136.

12 MS. BATALLER-SCHNEIDER: I don't believe this is the
13 first time that we brought this up.

14 THE COURT: No, I think it was mentioned briefly in our
15 final pretrial conference.

16 MS. BATALLER-SCHNEIDER: Yes. But it does mention that
17 for 12.2(b), if I understand, you can get to the final issue.
18 And I'm just trying to find where that is, Your Honor. I know
19 that it is in one of our motions. And I apologize for not having
20 this. It might be in our original motion, or jury instructions.

21 So this Document 136 just talks about how it is
22 relevant evidence to negate mens rea. But it's -- the notice is
23 77. And then we're, I believe in our original jury instructions,
24 and I'm not sure if it's clear in any of those, Your Honor, that
25 we can't -- that we can get to the final issue.

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1 But I believe if we look at 12.2(b), the statute
2 itself, it's very clear from there that we can ask the final --
3 as him to opine as to the final issue, that 704(b) does not come
4 into play. So I believe we'd have to look to the statute for
5 that, Your Honor.

6 And we also mention it in Document 113 in our requested
7 instructions, 12.2(b) mental health evidence. We mention it as
8 explaining Thomas' behaviors, but we also mention it as something
9 separate from the insanity defense where we could bring in the
10 psychological information.

11 (Pause)

12 THE COURT: Mr. Greenbaum, your response?

13 MR. GREENBAUM: Yes, Your Honor. I'm looking at
14 12.2(b).

15 I don't see anything where it allows you to give the
16 ultimate issue in regards to sanity, Your Honor. I still believe
17 that 704(b) completely applies in this case, Your Honor, which
18 prohibits an expert from testifying about whether the defendant
19 did or did not have a mental state or condition that constitutes
20 an element of a crime or of a defense.

21 Those matters are for the trier of fact alone, Your
22 Honor, and I believe that's what applies in this case, Judge.

23 THE COURT: Ms. Bataller, looking at your footnote on
24 Document 112, Footnote 1 on Page 2, so the very last sentence, if
25 you're there.

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1 MS. BATALLER-SCHNEIDER: Your Honor, I am so sorry.
2 I'm trying --

3 THE COURT: That's all right.

4 MS. BATALLER-SCHNEIDER: -- to find --

5 THE COURT: That's okay. It's Document --

6 MS. BATALLER-SCHNEIDER: It's 112 or 113?

7 THE COURT: 112. The notice of expert evidence.

8 MS. BATALLER-SCHNEIDER: Oh, the notice. Okay. Found
9 it. Thank you for your patience.

10 THE COURT: Okay. So read that to yourself, and I'm
11 going to ask you a question.

12 MS. BATALLER-SCHNEIDER: Yes, Your Honor. I apologize.
13 I think I misunderstood that 12.2(b). There was something in the
14 commentary that would allow us to ask the ultimate question.

15 THE COURT: Right. So while it goes to negate, it can
16 go to negate Andrea --

17 MS. BATALLER-SCHNEIDER: Yes.

18 THE COURT: I still don't think you can invade the
19 providence of the jury the ultimate issue that they're going to
20 decide. Obviously a rephrasing of some kind, possible. But I
21 just want to make sure we're -- I mean, I'm not trying to keep
22 you from asking what you ought to ask. But I think I should
23 bring the jury back in, have them disregard the --

24 MS. BATALLER-SCHNEIDER: The question?

25 THE COURT: -- the question, and you keep going with

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1 whatever you'd like and we'll see if we go --

2 MS. BATALLER-SCHNEIDER: Okay. I think that's my last
3 question. I think that would be my last question. So I can just
4 say nothing further.

5 THE COURT: Do you agree -- I mean, do you agree with
6 the Court?

7 MS. BATALLER-SCHNEIDER: The more I see in that
8 footnote, yes.

9 THE COURT: Okay.

10 MS. BATALLER-SCHNEIDER: I did have a --

11 THE COURT: That's the footnote you provided to me.

12 MS. BATALLER-SCHNEIDER: Yes, absolutely. Absolutely.

13 THE COURT: I knew I had seen that.

14 MS. BATALLER-SCHNEIDER: There has been a lot of --

15 THE COURT: I knew I had seen somewhere --

16 MS. BATALLER-SCHNEIDER: Right.

17 THE COURT: I knew it -- Ms. Salas actually found it
18 because she had seen it as well.

19 MS. BATALLER-SCHNEIDER: Oh, okay. I knew that there
20 was some idea that it didn't apply to that, but I don't have it
21 right in front of me, Your Honor.

22 THE COURT: Okay.

23 MS. BATALLER-SCHNEIDER: But --

24 THE COURT: Thank you.

25 MS. BATALLER-SCHNEIDER: -- I will refrain from asking

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1 that question.

2 THE COURT: Let's rise for the jury, please.

3 And, Dr. Schutte?

4 THE WITNESS: Sorry.

5 THE COURT: I was trying to give you a mental break by
6 letting you step down.

7 And, Mr. Greenbaum, you're going to cross?

8 MR. GREENBAUM: Yes, Your Honor.

9 (Jury in at 11:08 a.m.)

10 THE COURT: All right. Let's be seated, please. Thank
11 you. All right. So this is the objection is sustained. The
12 witness is instructed not to answer. And the question -- the
13 jury is instructed to disregard the question.

14 Your next question.

15 MS. BATALLER-SCHNEIDER: We have no further questions
16 at this point. Thank you.

17 THE COURT: Thank you. Mr. Greenbaum, your witness,
18 sir.

19 MR. GREENBAUM: Thank you, Your Honor.

20 CROSS-EXAMINATION

21 BY MR. GREENBAUM:

22 Q Dr. Schutte, good morning, sir.

23 A Good morning.

24 Q You and I have talked once before, correct?

25 A Yes.

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1 Q Okay. Let's first talk about this evaluation, or this when
2 you met with Thomas. When did this meeting occur that you're now
3 testifying to?

4 A September 4th, 2021.

5 Q So approximately a year ago, correct?

6 A Coming up on a year.

7 Q Yes, sir. And since then, have you met with him at any time
8 whatsoever?

9 A No, I have not.

10 Q Okay. And how long was this discussion or meeting that you
11 had with Thomas that time back on September 4th of 2021, about
12 almost a year ago?

13 A About two and a half hours.

14 Q Sir. So from that two and a half hour discussion, you came
15 up with the conclusion that he suffers from autism. Is that
16 correct?

17 A Autism Spectrum Disorder.

18 Q Yes, sir.

19 A Amongst other conditions, yes, sir.

20 Q And then Schizoaffective Disorder. Is that correct?

21 A That's correct.

22 Q Okay. And so just so the record's clear, who is paying for
23 your testimony today, sir?

24 A The Federal Public Defender.

25 Q Okay. So the Defense team is paying for your testimony,

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1 correct?

2 A The Federal Public Defender is paying for it.

3 Q Yes, sir. And how much are you getting paid to come here to
4 testify today?

5 A \$300 per hour.

6 Q Okay. And is that from, because you're out of El Paso,
7 correct?

8 A Correct.

9 Q So from the time you're leaving your office in El Paso,
10 you're getting \$300 from the time you're testifying, \$300 an
11 hour. Is that correct?

12 A That's correct, for time spent on this case.

13 Q Yes, sir. And the two and a half hours that you spent
14 talking to Thomas, you also -- did you also get \$300 there as
15 well, or was it a different fee?

16 A It was a different fee.

17 Q Okay. And how much was that fee, sir?

18 A I believe that was \$1,200 which included the evaluation and
19 also the travel time.

20 Q So, so far in this case you've made \$1,200 and depending on
21 I guess how long this lasts, \$300 per hour, correct?

22 A Correct, for my time spent on the case.

23 Q Yes, sir. Now you're aware that Mr. Thomas Scott Perkins,
24 he graduated from high school, correct? Right?

25 A Yes, he did.

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1 Q And isn't it true during high school he actually made As to
2 Cs, correct? He passed?

3 A Yes. He earned passing grades and was in special education
4 at times.

5 Q Yes. But my question is that he actually made As in classes
6 that he took in high school?

7 A In some classes, that's correct.

8 Q Okay. And as a matter of fact, is it true that Thomas
9 completed three years of college?

10 A Yes.

11 Q And as part of this, did you review his college transcripts
12 or anything like that?

13 A I did not. But I did see that he completed several years of
14 college but with no college degree.

15 Q And what are some of the classes he took in college?

16 A I didn't ask him which classes he took.

17 Q Wouldn't it be important to know if you're evaluating
18 somebody to see if they're low-functioning, they have autism, if
19 they're on schizophrenia and spectrum, if they had -- how they
20 got through three years of college?

21 A Well, looking at his history of IQ scores, what he reported
22 about his educational history was consistent with that.

23 Q Okay. So you never looked at one college class that he may
24 have taken?

25 A I did not, because it was not relevant to determining --

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1 Q I --

2 A -- which --

3 MR. GREENBAUM: Judge --

4 THE WITNESS: -- diagnoses he had.

5 MR. GREENBAUM: -- non-responsive, Your Honor. My
6 objection is non-responsive.

7 THE COURT: Sustained. If you'll just respond to the
8 question that's asked, sir.

9 THE WITNESS: Certainly.

10 THE COURT: You can ask your next question.

11 MR. GREENBAUM: Yes, Your Honor.

12 BY MR. GREENBAUM:

13 Q And the problem -- so you're relying on what Mr. Thomas
14 Perkins told you, correct?

15 A In addition to the testing and the review of records.

16 Q Right --

17 THE COURT: So the answer, sir, would be yes.

18 THE WITNESS: Yes, Judge.

19 THE COURT: Okay. Thank you. You can go on to the
20 next.

21 BY MR. GREENBAUM:

22 Q And depending on what somebody tells you, if they're telling
23 you the truth, that might be good. But if they're not telling
24 the truth, if you're relying solely on the word, that might
25 affect your findings, correct?

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1 A Correct, if you're relying solely on their word as you put
2 it.

3 Q Okay. And here really what other records did you -- let me
4 ask it this way. Did you look at the case report in this case,
5 like the offense reports, before you talked to Mr. Perkins?

6 A No, I did not.

7 Q Okay. Don't you think that would be important to find out
8 what exactly happened in this case?

9 A I was interested in finding out his story of it and what
10 conditions if any he might have had.

11 Q Okay. And I think Defense Counsel asked you in regards to
12 did you look at one interview with special Agent Ferg. Is that
13 correct?

14 A Yes, that was one of the interviews I reviewed.

15 Q Okay. And you reviewed that interview, correct?

16 A That's correct.

17 Q Okay. And you reviewed that at \$300 an hour. Is that
18 right?

19 A That is the fee I charge for work on this case.

20 Q Yes. Okay.

21 THE COURT: So yes. So the answer is yes.

22 THE WITNESS: Yes, Judge.

23 THE COURT: Let's just be more direct. Go ahead.

24 MR. GREENBAUM: Thank you, Your Honor.

25 BY MR. GREENBAUM:

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1 Q And at any time did you review the second interview? That
2 was Michelle Wilson from DPS.

3 A I believe that was the polygraph evaluation.

4 Q Again, did you review the second interview with Michelle
5 Wilson? Yes or no.

6 A Yes.

7 Q Okay. And when somebody says they use VPNs for risky
8 downloads, wouldn't that go potentially to knowing their -- state
9 of mind of knowing right from wrong, state of mind if they're
10 using VPNs for risky downloads?

11 A That has a potential --

12 Q Sir.

13 A -- contributing factor --

14 Q And if they --

15 A -- that's correct.

16 Q I'm sorry?

17 A I'm sorry. That's a potential contributing factor. That's
18 correct.

19 Q Yes, sir. Thank you for that. And what if they're using
20 multiple VPNs? Would that show some level of sophistication?

21 A That is something to be considered as well. Yes, sir.

22 Q And you had said that some people with autism, they collect
23 certain things like car toys, et cetera. Is that correct?

24 A That's correct.

25 Q Maybe baseball cards. Is that right?

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1 A Yes.

2 Q But you're not saying that all people with autism collect
3 child pornography, correct?

4 A That's not something that I've said.

5 Q So is that -- so my answer is not all people with autism
6 collect child pornography. Yes or no, sir.

7 A That's correct.

8 Q Okay. And not all people with autism search terms such as
9 PTHC, Lolita, preteen hardcore, preteen softcore. Is that
10 correct?

11 A That's correct.

12 Q And not all people tell law enforcement that their favorite
13 groups of child porn to look up is going to be eight, nine, ten
14 years old. Is that correct?

15 A That's correct.

16 Q And not all people with autism say they use multiple VPNs to
17 make sure there wasn't any leaks. Is that correct?

18 A That's correct.

19 Q And, sir, are you familiar with BitTorrent software?

20 A Very superficial.

21 Q Okay. Is that something that someone like you would use,
22 BitTorrent?

23 MS. BATALLER-SCHNEIDER: Your Honor, I'm going to
24 object to the relevance of this line of questioning.

25 THE COURT: Overruled. You can answer the question if

1 you use it or not.

2 THE WITNESS: No.

3 BY MR. GREENBAUM:

4 Q Okay. Is that something somebody with some sort of computer
5 sophistication that would know what BitTorrent or would be able
6 to use BitTorrent. Would you agree with me on that?

7 MS. BATALLER-SCHNEIDER: Your Honor, I'm going to
8 object again. There's no foundation that he would have that
9 information.

10 MR. GREENBAUM: If he knows, Judge.

11 THE COURT: I'll overrule the objection. You may
12 answer that if you know.

13 THE WITNESS: I can't speak to the level of
14 sophistication you would need to use that program.

15 BY MR. GREENBAUM:

16 Q And wouldn't that be important in your evaluation if
17 somebody's using sophisticated computer software to know how --
18 if they know how to operate that in regards to, you know, what
19 level they are on the autism spectrum. So if you're using
20 sophisticated computer software, wouldn't that be important to
21 know when you're doing your report?

22 A No.

23 Q And, sir, did you state that you interviewed this person in
24 regard to Mr. Thomas Scott Perkins, and had the issue of
25 malingerer? I'm sorry if I'm misstating things. I had four

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1 hours of sleep last night. Malingering, did you review that with
2 him, or did you evaluate him if he was malingering at all?

3 A Yes.

4 Q Okay. And did you find that he was malingering?

5 A No, he was not malingering.

6 Q Okay. And this issue of malingering has come up in your
7 testimony before, correct?

8 A Correct.

9 Q And as a matter of fact, I think on a case in Odessa with
10 Fabian Pavlan (phonetic), this issue of malingering came up. Is
11 that right?

12 A Polvon.

13 Q Polvon, yes. And you testified as an expert in that case,
14 right?

15 A That's correct.

16 Q And can you tell the jury what your expert testimony in a
17 nutshell was in Fabian Polvon?

18 MS. BATALLER-SCHNEIDER: Your Honor, I'd object to the
19 relevance of this question.

20 THE COURT: Overruled.

21 BY MR. GREENBAUM:

22 Q Go ahead, you can answer, sir.

23 A That was a capital murder case. I rendered the opinion that
24 due to severe major depressive disorder that he was insane at the
25 time of the offenses.

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1 Q And the jury disagreed with you, correct?

2 A Correct.

3 Q And they sentenced him to life without parole back in 2019.

4 Is that right?

5 A Incorrect.

6 Q What did they sentence him to?

7 A They didn't sentence him in 2019.

8 Q Okay. I'm sorry, back in 2021. But the offense occurred in
9 2019. But in 2021, the jury disagreed and sentenced him to life
10 without parole, correct?

11 A That's correct.

12 Q Thank you for that correction. As a matter of fact, you've
13 testified in other cases, correct, other big cases such as
14 Stephanie Fernandez. Is that right?

15 A I don't know how I would categorize that as being big or
16 small, but --

17 Q Okay. Well --

18 A -- I did --

19 Q -- did you testify --

20 A -- testify in that case.

21 Q -- in that case with Stephanie Fernandez, a capital murder
22 case?

23 A I did.

24 Q Okay. And that was an El Paso, Texas. Is that right?

25 A That's correct.

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1 Q And what were you going to testify to in that case?

2 A That she had Post Traumatic Stress Disorder or PTSD which
3 influenced her behavior in that case.

4 Q And did the judge in that case rule that you couldn't
5 testify in that capital murder case?

6 A In the case in chief, correct.

7 Q And why was that?

8 A He felt that the testimony I think was more relevant to the
9 punishment phase rather than determining guilt or innocence.

10 Q And furthermore, let me talk about another case that you
11 had. You also testified in regards to a case with a person by
12 the name of Alberto Mendiola. Is that correct?

13 A That's correct.

14 Q And what did you testify to in there?

15 A That was that the defendant had Post Traumatic Stress
16 Disorder, and as a result was insane at the time of the alleged
17 offense.

18 Q Okay. So in saying so, in other words he couldn't have
19 known what he was doing, so that would basically let him go out
20 the door, not guilty by reason of insanity, correct, if they were
21 to believe you?

22 MS. BATALLER-SCHNEIDER: Your Honor, I'm going to
23 object to the way he's characterizing the insanity defense.

24 THE COURT: And I'll sustain.

25 BY MR. GREENBAUM:

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1 Q So in regards to your sanity defense, did the jury agree
2 with it?

3 A They found him guilty of manslaughter rather than murder.

4 Q Okay. So they didn't find him insane, correct?

5 A Correct.

6 Q And as a matter of fact, he got 20 years in prison for that,
7 correct?

8 A I believe so, yes.

9 Q And certainly you're not telling this jury that this -- you
10 testified that the defendant told you he had a sex demon. Is
11 that right?

12 A Correct.

13 Q And, sir, you're not telling this jury that this sex demon
14 caused him to download over 100,000 images of child porn or a
15 combination of videos, correct?

16 A Correct. That was not my testimony.

17 MR. GREENBAUM: I pass the witness, Your Honor.

18 THE COURT: Redirect?

19 MS. BATALLER-SCHNEIDER: Just briefly, Your Honor.

20 REDIRECT EXAMINATION

21 BY MS. BATALLER-SCHNEIDER:

22 Q Are people with ASD intelligent in some aspects, or can they
23 be?

24 A Certainly.

25 Q Does that mean that they're intelligent in all aspects of

1 their lives?

2 A Absolutely not.

3 Q Does their intelligence in some areas have anything to do
4 with their understanding of reality or their perspective which is
5 based on ASD?

6 A Not necessarily. A person can have an average IQ, and yet
7 still have Autism Spectrum Disorder and still have social
8 limitations. A person can have an average IQ or an average
9 intelligence and still suffer from a Schizophrenic Disorder.
10 Those two aren't mutually exclusive.

11 MS. BATALLER-SCHNEIDER: One moment, please. Nothing
12 further. Thank you.

13 THE COURT: Anything further, Mr. Greenbaum?

14 MR. GREENBAUM: Nothing further, Your Honor.

15 THE COURT: You may step down, sir. Thank you very
16 much for being with us. Safe travels.

17 THE WITNESS: Thank you, Judge.

18 (Witness excused)

19 THE COURT: Next witness for the Defense?

20 MS. BATALLER-SCHNEIDER: Your Honor, at this time the
21 Defense would rest.

22 THE COURT: All right. Very well. May I have the
23 attorneys approach, please?

24 (Bench conference at 11:24 a.m.)

25 THE COURT: All right. Outside the presence of the

1 jury. Defense has rested. Does the Government plan to put on a
2 rebuttal witness or --

3 MR. GREENBAUM: We may, Your Honor. We just need to
4 briefly discuss.

5 THE COURT: You still need to talk?

6 MR. GREENBAUM: Yes, sir.

7 THE COURT: So my question would be -- well, why don't
8 I send them out here for five minutes and y'all discuss it. If
9 you have other witnesses besides this expert Browning, I'll let
10 those on today.

11 MR. GREENBAUM: Yes, sir.

12 THE COURT: And he really can't be here? I mean, he's
13 really not going to be here 'til tomorrow?

14 MR. CAYTON: He currently is in Oklahoma.

15 MR. GREENBAUM: Testifying, Your Honor, is my
16 understanding.

17 THE COURT: And the Defense objected to the testimony
18 by Zoom on Friday when I saw it. Does the Defense continue to
19 oppose that? Y'all talk about that.

20 MS. BATALLER-SCHNEIDER: Okay.

21 THE COURT: Okay?

22 MS. BATALLER-SCHNEIDER: We'll talk about that.

23 THE COURT: Because we can maybe stop him in Altus,
24 Oklahoma or whatever and --

25 MR. CAYTON: Altus Air Force Base, yeah.

1 THE COURT: If you think you need to. If you think you
2 need or want to. I'm going to give y'all five minutes. We can
3 cool our heels, and then y'all let me know before I bring them
4 back in.

5 MR. GREENBAUM: Okay.

6 MS. BATALLER-SCHNEIDER: We will.

7 THE COURT: Okay. Thank you, all.

8 (Bench conference ends at 11:25 a.m.)

9 THE COURT: All right. Ladies and gentlemen of the
10 jury, I'm going to have you step out for about five minutes.
11 This is how every case goes toward the end. It's more
12 dysfunctional, stopping and starting and whatnot. What I'm
13 trying to do is be as efficient with your time as I possibly can.
14 It's fine your frustration with that. I know it's frustrating.

15 And so you're going to leave your notebooks here.
16 You'll remember your instructions. This is likely going to be
17 five to seven minutes of a break, and then we'll come right back
18 in and go forward with the rest of the trial. Remember your
19 instructions. Let's rise for the jury, please. I'll see y'all
20 in just a few minutes.

21 (Jury out at 11:26 a.m.)

22 THE COURT: All right. Outside the presence of the
23 jury.

24 Just so we're clear, you all need to discuss with each
25 other and together kind of. And then I'm going to come back in

1 five minutes and y'all -- and Government needs to give me a plan.
2 Okay?

3 MR. GREENBAUM: Yes, Your Honor.

4 THE COURT: Going forward.

5 MR. GREENBAUM: Yes, Your Honor. Thank you.

6 THE COURT: Perfect. Thank y'all.

7 (Recess at 11:26 a.m./Reconvened at 11:33 a.m.)

8 (Outside the presence of the jury; defendant present)

9 THE CLERK: All rise.

10 THE COURT: All right. Let's be seated, please.
11 Outside the presence of the jury.

12 Mr. Greenbaum, Mr. Cayton, what's the Government's plan
13 going forward, having spoken I assume with yourselves and among
14 yourselves with the attorneys for the Defense.

15 MR. CAYTON: Your Honor, we've discussed with the
16 Defense. They are allowing our expert to testify via Zoom.
17 However, we do not intend on calling the expert at this point.
18 We would, however, call two rebuttal witnesses. The first one is
19 Coleman Boring, the HSI trainee. We do believe, based upon the
20 testimony that was just presented, Defense --

21 THE COURT: And who's your second?

22 MR. CAYTON: It would be Special Agent Craig Butler
23 from the Department of Agriculture.

24 THE COURT: Okay. And so you're not going to -- your
25 plan right now is not to call your expert?

1 MR. CAYTON: That's correct, Your Honor.

2 THE COURT: Okay. All right.

3 MS. BATALLER-SCHNEIDER: Your Honor, I would just ask
4 what Agent Boring is going to testify to. If he's going to
5 testify to that VPN statement, I don't know how that's -- any
6 door was open to that.

7 MR. CAYTON: So, Your Honor, the Defense witness just
8 testified, and the Defense Attorney I felt did a very good job
9 about talking about suggestibility and parroting and
10 agreeability, things like that.

11 The spontaneous statement that Agent Boring will bring
12 up and talk about is as soon as the defendant was pulled out of
13 the house, before any statements were ever made to him, before he
14 was told what was going on, he made a statement regarding there's
15 no way you guys -- I'll have to find the exact statement.

16 THE COURT: Well we won't hold you to the --

17 MR. CAYTON: But essentially there's no way you guys
18 could have found what you found legally, I was using two
19 different VPNs. I believe based upon the Defense testimony, the
20 Defense expert testimony, that that is now relevant for the trier
21 of fact to hear that he knew what he was doing was wrong.

22 And the fact that agents came into his house, he
23 already had an idea of what they were looking for, something that
24 was illegal that he possessed. And he was using multiple methods
25 to try to get around it. And I think that that definitely cuts

1 against the Defense expert testimony that, you know, this
2 interview wasn't really saying what it was saying.

3 THE COURT: Ms. Bataller, what would your response to
4 that --

5 MS. BATALLER-SCHNEIDER: Yes.

6 THE COURT: There was direct -- I mean, Dr. Schutte is
7 a good witness, he's an expert. And he did give testimony as to
8 mens rea, the defendant's mens rea. I mean, that is the purpose,
9 right?

10 MS. BATALLER-SCHNEIDER: I understand that, Your Honor.
11 Yes, it's the purposes under 12.2(b) and for the insanity
12 defense. What I would say is that we didn't specifically mention
13 anything to do with VPN and explaining away why he would have
14 mentioned the VPN.

15 I would also say that it's extremely cumulative at this
16 point. I believe they've had more than one witness. They had
17 Agent Ferg and another witness. And I believe it was two, it may
18 have been more, testify about the VPN issue. It's just
19 cumulative at this point. They can still argue that in their
20 closing argument. They have multiple witnesses they can point
21 to.

22 THE COURT: I don't find it to be insufficiently or
23 over cumulative from what I've heard. There's been some VPN
24 testimony, don't get me wrong, mostly just asking witnesses what
25 does that stand for and what does that mean and what does that

1 do.

2 I think what Agent Boring -- I think Boring's the one
3 you all have called, and I wouldn't allow certain testimony at
4 the time. I believe that door has been opened now. I do believe
5 this will be new evidence. This is something nobody else has
6 said or been able to testify to, I suspect. And I don't know if
7 there's somebody else who heard it as well. But it was a
8 statement by the defendant not in response to any question.

9 I do believe that while there likely is some
10 prejudicial effect to the defendant, I don't think it
11 substantially outweighs the probative value of this jury to hear
12 it under Rule 403. So I'll allow that testimony.

13 MS. BATALLER-SCHNEIDER: Could I just have some
14 clarification on that for the record, Your Honor? You did
15 mention opening the doors, and just in general the mens rea
16 testimony opened the door.

17 THE COURT: No. Definitely the mens rea. The overall
18 tenor of the Defense has been mens rea, has been --

19 MS. BATALLER-SCHNEIDER: Correct.

20 THE COURT: -- that issue. And I think that
21 Dr. Schutte, in discussing that, was talking about well he's --
22 you know, this level of sophistication, the fact that he has
23 gone, you know, he's had actually some three years of college
24 that I guess Dr. Schutte knew about some of the college but not
25 all of it. Talked about the social awkwardness and the

1 collection of things, and this does go, as Mr. Cayton said, I
2 think it goes to show that what, you know, the intent of
3 Mr. Perkins in doing this.

4 I mean, he -- sounds like to the Court that Mr. Perkins
5 did -- took several measures and steps to try to ensure -- first
6 of all, I mean, he had done some Supreme Court case law research,
7 you know, as to what was legal and what was not legal. Or at
8 least he said he did.

9 MS. BATALLER-SCHNEIDER: Seems maybe --

10 THE COURT: He may not have done that. It's a good --

11 MS. BATALLER-SCHNEIDER: -- incorrect. Maybe incorrect
12 research.

13 THE COURT: No, I see it in your face. You're right.
14 No, that's a good point. That's the way my wife looks at me when
15 I'm making a point that there's a better point. He may not have
16 done it -- you know, he kind of led with that, that he had done
17 it, that research.

18 I think it goes to show the different steps Mr. Perkins
19 went to, and the mere fact that he has a VPN, maybe that's sort
20 of neutral. But the fact that he -- it occurs to him to mention
21 that, and I'm not trying to make the Government's argument for
22 you.

23 It's just to me it seems like the fact that he goes to
24 the lengths of mentioning even I don't see how you could have
25 gotten past, you know, my VPN, that says a level of

1 sophistication above what I have, above probably what Dr. Schutte
2 -- I think it's what Dr. Schutte was trying to say was, you know,
3 that's above my level of expertise in that.

4 And I think that would go to show the mens rea element.
5 And if you're stating the mens rea element, if the Defense says
6 the mens rea element can't be met, I thin the Government's
7 allowed to put on evidence that sure enough it is being met here.

8 MS. BATALLER-SCHNEIDER: Thank you for the
9 clarification.

10 THE COURT: That would be my -- I mean, I know that's
11 kind of all over the place. But just a general tenor of the
12 Defense, not necessarily just the mens rea. I mean, it's
13 everything that the Defense has done since we started the trial
14 which I think is an effective defense, frankly.

15 MR. CAYTON: And, Your Honor, I'm happy to point to a
16 specific part in the testimony that I felt we got to. It was
17 when the Defense attorney was asking the witness regarding the
18 interview and repeating things that they had a hard time
19 understanding the meaning, suggestible or influenced by those
20 around him, that type of testimony.

21 THE COURT: Could you just speak up a little?

22 MR. CAYTON: I'm sorry, Your Honor. Repeating things
23 that they had heard without understanding the meaning, and being
24 suggestible or influenced by those around him. And I think that
25 that testimony particularly was going towards the defendant not

1 understanding and just trying to kind of go along with what the
2 investigators were saying, and the fact that he is making the
3 statement prior to ever being talked to by investigators --

4 THE COURT: Well, they --

5 MR. CAYTON: -- specifically is where I feel like --

6 THE COURT: And I think also -- I agree with that. It
7 also tends to make you wonder, I sit here and wonder as not a
8 judge of the facts in this case, as someone who's not a judge of
9 the facts, I'm sitting here thinking through this thing okay, he
10 collects things, those things repeatedly. There's a comfort
11 level with even clapping hands. I mean, I get all that.

12 But there would tend to be a difference in someone
13 collecting bottle caps, as I show you my bottle cap, versus
14 something most of us know to be wrong. And that's what the
15 jury's trying to decide. There's little -- excuse me. There's
16 little dispute I think that it was collected.

17 The dispute would be, and the defense seems to be did
18 he even really know that was wrong. Did he know it was wrong
19 that he did it. I think that goes to the very heart. I think
20 I'm going to allow the rebuttal testimony. I don't think it is
21 -- I do think, I frankly do think it is adequately new. And even
22 though the term VPN has been discussed during the trial, that
23 doesn't mean it's just repetitive and would be prejudicial for
24 that effect. It's prejudicial because of what it likely will say
25 to the jury about his understanding of it, the defendant's

1 understanding of it.

2 Mr. Cayton, you have somebody that's Butler?

3 MR. CAYTON: Yes, Your Honor. Special Agent Craig
4 Butler.

5 He was also present during the interview of the
6 defendant with Special Agent Ferg. Specifically, I intend to ask
7 him a few questions about in rebuttal to the expert's testimony
8 regarding the defendant's mannerisms at the time, the defendant's
9 understanding of what was going on, whether or not the defendant
10 was -- seemed to be led, whether or not he was demonstrating that
11 he understood that it was wrong to have child pornography, things
12 to that respect.

13 THE COURT: Like what? I mean, I'm a little --

14 MR. CAYTON: Specifically, did he mention whether or
15 not he knew what he was doing was wrong.

16 THE COURT: Did he make a statement like that?

17 MR. CAYTON: That's what Andrew Butler has told me,
18 yes.

19 THE COURT: It's on the recording?

20 MR. CAYTON: I believe so, Your Honor. I mean, I know
21 it was back and forth a lot. But they had acknowledgments from
22 him regarding collecting underage children videos, things like
23 that.

24 MS. BATALLER-SCHNEIDER: Your Honor, if I could?

25 THE COURT: Sure.

1 MS. BATALLER-SCHNEIDER: I think the best evidence here
2 is the recording. The Government can certainly point to that.
3 We don't need to hear Agent Butler, and I don't think it's
4 admissible, his interpretation of what was happening during that
5 interview when the jury can just listen to the recording.

6 THE COURT: I agree with that. I don't think he should
7 testify, I don't think I should allow him to testify that he
8 thought, that the agent thought that the defendant knew, you
9 know, it was wrong. Can you queue that up for me on the audio?

10 MR. GREENBAUM: I would not be able to off the top of
11 my head, Your Honor.

12 THE COURT: Well, I think the question that could be
13 asked would be did he state that he knew it was wrong or whatever
14 it may be. Whatever the question is, it goes directly to what
15 you're trying to get him to say. But his impression of what the
16 defendant was thinking is certainly speculative and would be
17 inadmissible anyway on a case in chief or rebuttal.

18 MR. CAYTON: I understand that point, Your Honor.

19 I guess what I'm interested in eliciting from Agent
20 Butler is that, you know, we're only listening to an audio
21 recording. And we have an expert who just testified about the
22 mannerisms, about the understanding, the uncomfortableness, a lot
23 of things that are not visible on an audio recording only. And
24 that's what I would like to use Agent Butler to rebut.

25 THE COURT: Okay. Tell you what let's do. Have Agent

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1 Butler come in and put him on the stand outside the presence, and
2 ask him your questions. Let's do that. Let's just, let's be
3 better safe than sorry.

4 (Pause)

5 THE COURT: Agent Butler, if you'd come on up. I'm
6 going to have you take the stand over here.

7 MR. BUTLER: Yes, sir.

8 THE COURT: We'll -- before you have a seat, let me --
9 if you'll raise your right hand.

10 CRAIG BUTLER, GOVERNMENT'S WITNESS, SWORN

11 THE COURT: Thank you very much. You may have a seat.

12 And, Mr. Cayton, you may proceed whenever you're ready.
13 This is, just for the record, outside the presence of the jury as
14 a preview of the rebuttal, of the very brief rebuttal testimony
15 that the Government wishes to elicit from Special Agent Butler.

16 MR. CAYTON: I don't know if I promised it was very
17 brief, Your Honor, but I'll try. And would the Court like me to
18 go through all my regular opening questions, or just kind of cut
19 to the chase?

20 THE COURT: No, no. Just ask him his name and let's --
21 you're OIG Special Agent, right, for Department of Agriculture?

22 THE WITNESS: Yes, sir.

23 THE COURT: Okay. And it's Craig Butler, B-U-T-L-E-R?

24 THE WITNESS: That's correct.

25 THE COURT: Go right ahead.

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1 MR. CAYTON: Thank you, Your Honor.

2 DIRECT EXAMINATION

3 BY MR. CAYTON:

4 Q Agent Butler, you were present during the interview with
5 Thomas Perkins?

6 A Yes.

7 Q and that was also with Special Agent Ferg?

8 A Yes.

9 Q And without getting into the substance of the conversation
10 you had with the defendant, were you able to observe his
11 mannerisms during that conversation?

12 A Yes.

13 Q Did he appear to you to be uncomfortable?

14 A Uncomfortable?

15 Q Yes.

16 A Yes.

17 Q Did he appear to you to --

18 THE COURT: Now don't lead him.

19 MR. CAYTON: Thank you, Your Honor.

20 THE COURT: It would be how did he appear to you,
21 comfortable or uncomfortable.

22 MR. CAYTON: Yes, sir.

23 THE COURT: It's all right.

24 BY MR. CAYTON:

25 Q Did he ever give the indication to you he did not know what

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1 was going on?

2 A No.

3 Q Was he willing to talk to you?

4 A Yes.

5 Q Was he, as has been previously described, brutally honest
6 with you?

7 A Brutally honest, no.

8 MS. BATALLER-SCHNEIDER: Your Honor, I'm going to
9 object to that. I don't know how he would know whether or not --

10 THE COURT: Yeah, I'm not --

11 MS. BATALLER-SCHNEIDER: -- Thomas was --

12 THE COURT: Well, and see --

13 MS. BATALLER-SCHNEIDER: -- honest or not.

14 THE COURT: -- what Mr. Cayton's doing is he's taking
15 your phrase because you asked the word was he brutally honest. I
16 can't remember who --

17 MS. BATALLER-SCHNEIDER: Right.

18 THE COURT: Okay.

19 MS. BATALLER-SCHNEIDER: And that's an okay --

20 THE COURT: At the time I'm thinking --

21 MS. BATALLER-SCHNEIDER: -- phrase to use.

22 THE COURT: -- whether it's kind of brutal or not.

23 MS. BATALLER-SCHNEIDER: Right. Well sometimes it's
24 kind of mean is what I meant. You know?

25 THE COURT: I know. I know. And bottom line,

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1 regardless of your feelings, I'll go ahead and tell you. So
2 let's rephrase that question. I don't like that question either.
3 She and I don't like that question.

4 MR. CAYTON: Two out of three, Your Honor.

5 BY MR. CAYTON:

6 Q Did he appear evasive in answering your questions?

7 A Yes.

8 Q Did he acknowledge to you that he understood the questions
9 that were being asked?

10 A Yes.

11 MR. CAYTON: That's about all I would ask, Your Honor.

12 THE COURT: All right. Ms. Bataller?

13 CROSS-EXAMINATION

14 BY MS. BATALLER-SCHNEIDER:

15 Q Are you trained in dealing with people with Asperger's
16 Spectrum Disorder or Schizoaffective Disorder?

17 A No, ma'am.

18 Q And you are a -- you work for the USDA?

19 A Correct.

20 Q You don't typically do child pornography investigations I
21 would imagine?

22 A I do not.

23 Q And your interview with Thomas was recorded. Is that right?

24 A Yes.

25 Q Did you listen to the recording?

1 A I did.

2 Q And is that a true and accurate representation of what
3 happened in that interview?

4 A Yes.

5 Q And that -- you and the other agent were the ones who
6 decided to record that, correct?

7 A Yes.

8 Q And you decided to do a voice recording, correct?

9 A Yes.

10 Q And not a video recording?

11 A Correct.

12 MS. BATALLER-SCHNEIDER: Nothing further.

13 THE COURT: Mr. Cayton, any redirect?

14 MR. CAYTON: No, Your Honor.

15 THE COURT: All right. You still want to offer him?

16 MR. CAYTON: Yes, Your Honor.

17 THE COURT: All right. Go ahead and sit down. If
18 you'll go on back outside. We'll -- thanks.

19 (Witness excused)

20 THE COURT: So we'll come back in. I'm going to allow
21 you to call Agent Boring. I'm not going to allow you to call
22 Agent Butler unless I hear something more --

23 MR. CAYTON: Yes, Your Honor.

24 THE COURT: -- on rebuttal. I think that's repetitive.
25 I don't think it adds anything. Frankly now I find the Defense,

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1 I might want to call him myself. She kind of makes more points
2 than you do I think on that. But -- and you can still argue.
3 And, you know, I'd save that for argument. That's just my
4 thought.

5 So you're going to have one witness, and that's Butler.

6 MR. CAYTON: Boring, Your Honor.

7 THE COURT: I'm sorry. Boring. Boring.

8 MR. CAYTON: We can go back and forth, Your Honor.

9 MS. BATALLER-SCHNEIDER: A lot of B last names in this
10 case.

11 THE COURT: A lot of Bs. Boring. And then don't be
12 boring with him, though. Be dynamic.

13 MR. CAYTON: He's a very exciting person, Your Honor.

14 THE COURT: So, very exciting. So then you don't have
15 any other witnesses, right?

16 MR. CAYTON: Correct, Your Honor.

17 THE COURT: That will be it. You'll rest and you'll
18 close then. The Defense, will you have anything more or will you
19 close?

20 MS. BATALLER-SCHNEIDER: We will close, Your Honor.

21 THE COURT: Okay. All right. Let's bring the jury in.
22 Let's rise for the jury, please.

23 (Jury in at 11:52 a.m.)

24 THE COURT: All right. Let's be seated, please. Thank
25 you. Thanks for bearing with us. The Defense having rested

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1 their case, Mr. Cayton, does the Government have any rebuttal
2 witnesses?

3 MR. CAYTON: Yes, Your Honor. The Government would
4 call HSI Trainee Coleman Boring.

5 THE COURT: Coleman Boring. And somebody's on the way
6 to get them, right?

7 MR. CAYTON: Yes, Your Honor.

8 THE COURT: All right. Thank you.

9 Sir, if you'd come on up. You were up here yesterday I
10 think. Maybe not. Come on up.

11 THE CLERK: Could you stop right there?

12 COLEMAN BORING, GOVERNMENT'S WITNESS, SWORN

13 THE COURT: Go ahead and have a seat. Adjust yourself
14 to that microphone. Mr. Cayton, you may proceed whenever you and
15 Agent Boring are ready.

16 MR. CAYTON: Thank you, Your Honor.

17 DIRECT EXAMINATION

18 BY MR. CAYTON:

19 Q Could you please introduce yourself to the Court?

20 A My name is Coleman Boring. Last name's spelled B-O-R-I-N-G.

21 Q And where are you currently employed?

22 A I'm currently employed as an HSI Special Agent.

23 Q And have you had training yet?

24 A No. Currently pending going to training.

25 Q And I want to direct your attention back to 2020 in January

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1 of that year. Where were you employed at that point?

2 A At that time I was employed by a Border Patrol agent
3 assigned as a task force officer to Homeland Security
4 Investigations.

5 Q Now on January 9th, 2020, did you have an opportunity to
6 assist with a search warrant?

7 A Yes, sir.

8 Q And where was that search warrant?

9 A I don't recall the specific address, but it was in Fort
10 Stockton, Texas.

11 Q And were you -- what was your participation in the search
12 warrant?

13 A I was assigned to assist the case agent, David Ferg, on a
14 child pornography search warrant on the entry team to conduct the
15 search of the home.

16 Q So when you're talking about a search warrant, what does an
17 entry team do?

18 A The entry team on a search warrant is the law enforcement
19 personnel that will actually make contact with the home, make
20 entry into the home, and secure the residence or whatever
21 establishment the warrant is for so that the search teams can
22 properly search the place, the residence.

23 Q And did you in fact go into the residence for the search
24 warrant?

25 A Yes, sir, I did.

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1 Q And did you encounter anyone in the residence?

2 A Yes, sir, I did.

3 Q And is that person in court today?

4 A Yes, sir, he is.

5 Q Can you please identify him?

6 A He's the gentleman sitting at the defense table with the
7 black suit, white shirt, wearing glasses.

8 MR. CAYTON: May the record reflect an identification
9 of the defendant, Your Honor?

10 THE COURT: The record shall so reflect.

11 BY MR. CAYTON:

12 Q And when you're conducting a search warrant, do you allow
13 people inside the residence to stay in the residence, or do you
14 remove them?

15 A We remove any persons that are found to be inside the
16 particular occupancy, the residence in this case.

17 Q And did the defendant -- was the defendant removed from the
18 residence while the search warrant was being conducted?

19 A Yes, sir, he was.

20 Q And what was done with the defendant after he was removed
21 from the residence?

22 A Initially after the subject was removed from the home, he
23 was sat down on a chair just outside the home so that we could
24 securely place him inside of a vehicle.

25 Q While he's sitting in this chair, do you start interviewing

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1 him?

2 A No, sir.

3 Q While he is in the chair, did the defendant make any
4 statements related to the purpose of the search warrant?

5 A Yes, sir, he did.

6 Q And was he asked any questions prior to making this
7 statement?

8 A No, sir.

9 Q What if anything did the defendant say?

10 A The defendant had first looked at me and asked why Border
11 Patrol was there because there were no illegals in the home. And
12 then --

13 Q Let me take a step back. Was that his statement, there's no
14 illegals in the home?

15 A Yes, sir.

16 Q Did he make any other statements?

17 A Yes, sir. A few moments later he was inquiring as to what
18 was going on at the home. And he stated what's going on.
19 Anything that you got, you had to have gotten illegally because
20 there's no way you got passed my VPNs.

21 MR. CAYTON: Pass the witness, Your Honor.

22 THE COURT: Thank you. Ms. Bataller, your witness.

23 MS. BATALLER-SCHNEIDER: Thank you.

24 CROSS-EXAMINATION

25 BY MS. BATALLER-SCHNEIDER:

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1 Q Morning. It's still morning. Now when Thomas was sitting
2 outside the home, was it just you outside with him?

3 A No, ma'am.

4 Q Who else was out there?

5 A I don't recall who was there. I was brand new to being a
6 task force officer and there were multiple agencies there. So I
7 don't recall specifically who.

8 Q Can you give us a ballpark number of how many people were
9 there with you?

10 A Standing outside at that moment, maybe two other law
11 enforcement officers that were in the vicinity and maybe four
12 more out on the perimeter. But I don't -- I can't tell you for
13 sure if any were standing right next to me.

14 Q And as law enforcement officers, and Border Patrol as well,
15 you learn early on that it's important to write down records of
16 what you -- of important details in a case, correct?

17 A Depending on the specific case, yes, ma'am.

18 Q And you write down those records because you want to make
19 sure -- you know that these cases go to trial sometimes, correct?

20 A I have since learned that, yes.

21 Q And as a Border Patrol agent, you understood that cases go
22 to trial, correct?

23 A I understood they went to trial. I had in fact never been
24 in court as a Border Patrol agent.

25 Q Okay. But you're trained to do -- to be a Border Patrol

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1 agent, correct?

2 A Yes, ma'am.

3 Q And part of your training is, and in training you learn that
4 recording important aspects of a trial is something that you need
5 to do. Is that right?

6 A Yes, ma'am.

7 Q And most law enforcement agents are trained to do that,
8 correct?

9 A Yes, ma'am.

10 Q That's because you want to have a full record what actually
11 happened in a case?

12 A Yes.

13 Q To do that case well?

14 A Yes.

15 Q You never made any report mentioning this comment about the
16 VPN, did you?

17 A At the time, no.

18 Q You never wrote this down anywhere?

19 A I can't say that I did, no.

20 Q And as far as you're aware, no agent whatsoever in this case
21 wrote down this statement about a VPN outside the home?

22 A I can't say. It's not my case.

23 Q You've talked to the prosecutors in preparation for this
24 case, correct?

25 A Yes, ma'am.

Boring - Redirect/Cayton

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1 Q And you, up until last Friday I believe, did not tell them
2 about this statement. Is that right?

3 A Yes, ma'am. That was actually my first opportunity to speak
4 with the prosecution about this case.

5 Q But that was just this last Friday, correct?

6 A Yes, ma'am.

7 Q And you had an opportunity before that to write a report,
8 correct?

9 A Yes. And I did write a report.

10 Q You did a report --

11 A Yes.

12 Q -- in this case?

13 A Yes, ma'am.

14 MS. BATALLER-SCHNEIDER: Your Honor, may we approach?

15 THE COURT: No. Let's just go forward.

16 BY MS. BATALLER-SCHNEIDER:

17 Q Did you give that report to the prosecutor?

18 A Yes, ma'am. That report of investigations is submitted in
19 the case file. That should have been turned over in discovery I
20 imagine.

21 Q And nowhere in your report did you mention anything about
22 VPNs, did you?

23 A No, ma'am.

24 MS. BATALLER-SCHNEIDER: Nothing further.

25 THE COURT: Any redirect?

1 MR. CAYTON: Thank you, Your Honor.

2 REDIRECT EXAMINATION

3 BY MR. CAYTON:

4 Q Agent Boring, do you remember this statement being made?

5 A Yes, I do.

6 Q You said you had just gotten on to the task force as a TFO?

7 A Yes, sir.

8 Q Was this your first search warrant with the task force?

9 A This was my first search warrant in my career by actually
10 participating and having a major involvement in.

11 Q Was it surprising to you that this statement was made?

12 A Yes, it was.

13 Q Is the statement still clear in your mind today that that's
14 the statement that was made by the defendant?

15 A Yes, sir.

16 MR. CAYTON: Pass the witness, Your Honor.

17 THE COURT: Anything further?

18 MS. BATALLER-SCHNEIDER: Nothing further.

19 THE COURT: You may step down. Thank you very much.

20 (Witness excused)

21 THE COURT: Government's next witness?

22 MR. CAYTON: The Government would rest, Your Honor.

23 THE COURT: Government close?

24 MR. CAYTON: Yes, Your Honor.

25 THE COURT: Defense?

1 MS. BATALLER-SCHNEIDER: Your Honor, we close, as well.
2 We have nothing further.

3 THE COURT: Great.

4 Ladies and gentlemen of the jury, you've now -- both
5 sides have rested and closed. That means that you have received
6 all the evidence you're going to receive in the case. That does
7 not mean I've given you the case to deliberate. I'll let you
8 know when that is.

9 So what we're going to do is I'm going to have you go
10 to lunch. I'm going to give you a little bit longer lunch than
11 you would care to take, probably, but not too long because we
12 have some work to do.

13 When you come back, you'll find in your chair, along
14 with your notebook because you'll leave it here still, a copy of
15 the Court's instructions to the jury. That's what we call the
16 Court's charge. And you'll have your own copy.

17 I am required to read it to you. I know you know how
18 to read. But I am required to read it to you. I'll do the best
19 I can and you can follow along and test me like a reading test
20 for me. But the main thing is that you comprehend what's in
21 there.

22 And so some people read along with me. Some people set
23 it aside and just listen and look at me, stare, whatever.
24 Whatever you want to do is how -- you have your copy though so I
25 tell you that because you can make marks on it, you can highlight

1 things, circle things, underline them. You don't have to do any
2 of that.

3 You can take that instruction, that Court's charge back
4 to the jury room with you when you do retire to deliberate. And
5 you don't have to do that either. You can leave it here and just
6 go back. Whatever you want to do, it's totally up to you. I'll
7 take -- we'll take up all the notebooks and the Court's charge
8 copies before you all leave when this whole thing's over so we
9 can shred all that and make sure no sensitive information gets
10 out.

11 And so you'll read along with me or listen to me read
12 the charge. Once I do that, the parties have an opportunity to
13 then make their final summations or arguments, final arguments.
14 As opposed to the opening statements which is just really to tell
15 you what they expect the evidence will be, the summation is to
16 try to persuade you and talk to you, you know, talk to you about
17 what they think is important, the attorneys think you should
18 think is important.

19 And so that's their opportunity. The Government, by
20 reason of having the burden of proof, is allowed to open and then
21 also close. So they get to split their time up even though it's
22 front-loaded with a lot more time up front because the Defense
23 has a right to rebut, and then the government has a little bit of
24 time when they come back to rebut the closing argument of the
25 Defense.

1 So even though the Government gets to split up their
2 time, each side gets the same amount of time. The Government
3 just chooses to split theirs up typically so that they can give
4 you a final -- the final words, their final few minutes of theirs
5 because they have the burden of proof.

6 And so that's what we'll do. Once they do that, then
7 I'll let you know what we do after that. So what I'm going to do
8 is it's 12:05-ish. 12:03 by my watch. But I'm going to give you
9 a couple of hours for lunch. You'll remember your instructions.
10 You'll leave your notebooks here. You'll leave your badges here,
11 either here or in the jury room.

12 You're welcome to go to lunch together if you want.
13 Doesn't mean you have to. If you do, talk about anything but the
14 trial or the facts of the case. And we'll have you back at two
15 o'clock. What we're going to do is we're going to stay and work.
16 And we're working on that charge that we're going to present to
17 you.

18 We're going to make sure that everybody's good with it
19 and all that, and it's in the best and most appropriate form for
20 you and we'll have them -- once we all agree, we'll print out
21 copies and leave them on your chairs for you. Okay? Any
22 questions? So that's where we'll go.

23 So once we do that, then after all the arguments, I'll
24 tell you that you're retiring to deliberate and that's when
25 you'll take your notebooks if you want to, and take your charge

1 if you want to, and you'll go back to the jury room and
2 deliberate. All right? Very well.

3 With that, have a great lunch. Let's rise for the
4 jury.

5 (Jury out at 12:05 p.m.)

6 THE COURT: Be seated, please. Outside the presence of
7 the jury.

8 So the charge, we're going to print the latest and
9 greatest charge for you in a moment. One question I had. I know
10 that the Defense stipulated that this was child pornography.
11 Right? But there's no written stipulation that was entered.

12 MR. GORMAN: That's correct, Your Honor.

13 THE COURT: Okay. So on the stipulation evidence, I'm
14 sorry, the instruction, do the parties want the Court to include
15 that stipulation? I think it's in -- is it already in there?

16 THE CLERK: It's in red.

17 THE COURT: Yeah, it's in red. It's in here. Y'all
18 tell me if you want it to go -- if you want it in or not.

19 MR. CAYTON: Yes, Your Honor.

20 THE COURT: You do? The Government does.

21 MR. CAYTON: Yes, Your Honor.

22 MR. GORMAN: The red is in terms of the --

23 THE COURT: We're going to take the red out.

24 MR. GORMAN: Oh, no. Not that, Your Honor. But in
25 terms of the stipulation --

1 MS. BATALLER-SCHNEIDER: Trying to find it.

2 MR. GORMAN: -- I didn't know if the Court was -- what
3 page is this on?

4 THE COURT: Page -- oh. You didn't print it with a
5 color printer, did you?

6 MR. GORMAN: I did, Your Honor.

7 UNIDENTIFIED SPEAKER: It should be at the end of Page
8 2. But some of it continues to Page 3.

9 THE COURT: I mean, unless I said something about a
10 stipulation was introduced.

11 UNIDENTIFIED SPEAKER: It's just evidence is the sworn
12 testimony of the witnesses, including stipulations and exhibits.

13 THE COURT: Oh, is it just the wording? Oh, we'll
14 leave that. We'll leave that in there.

15 MR. GORMAN: I have no problem with that, Your Honor.

16 THE COURT: There's no instruction though, right, about
17 the stipulation as to child pornography. Okay.

18 MR. GORMAN: But I assume the Court would add the
19 specific stipulation, correct, in terms of that?

20 UNIDENTIFIED SPEAKER: They have been provided.

21 THE COURT: We can. Why don't y'all write it down for
22 us. And I think we should.

23 UNIDENTIFIED SPEAKER: It's really just straight to the
24 element, Your Honor. The jury has to find that the materials in
25 fact, and I think just the parties stipulate that the material --

1 MR. CAYTON: Meet the designation of child pornography.

2 THE COURT: Okay. We'll just add that in there.

3 MR. GORMAN: That works.

4 THE COURT: Okay. And then, Mr. -- so what we're going
5 to do is I'm going to print this off, have her print it. It's
6 about 23 pages long, or thereabouts. We'll of course tweak it so
7 that Mr. Perkins did not testify. We'll make sure that language
8 is in there. I sustained some objections to questions. I will
9 make sure that's in there.

10 Mr. Cayton, what -- before we print this and let y'all
11 look at it, we'll go back on the record, of course. Was there
12 something specific you wanted to discuss?

13 MR. CAYTON: No, Your Honor. I just was standing and I
14 forgot to sit down.

15 THE COURT: Oh. Mr. Gorman?

16 MR. GORMAN: I didn't know in terms of the instructions
17 I guess the Court is going to include the expert opinion
18 testimony?

19 THE COURT: So our experts were Dr. Schutte, we had
20 Mr. Yanez. Was there somebody else?

21 MR. CAYTON: I think that was the only --

22 MR. GORMAN: I think that was it, Your Honor.

23 THE COURT: Oh, I'm thinking about Browning that didn't
24 get called. Has he been called off?

25 MR. GREENBAUM: Judge, I'm going to call them. He

1 just --

2 THE COURT: Okay.

3 MR. GORMAN: He'll be here tomorrow, Your Honor, if you
4 want to --

5 THE COURT: I'd be pretty mad. What else, Mr. Gorman?

6 MR. GORMAN: The other two, Your Honor, were 128 which
7 was the confession statement, voluntary, introduce his statements
8 in that turns in, you know, with the jury assessing the,
9 essentially the contents of that confession, the voluntariness of
10 it. That's a standard once the statement's introduced.

11 THE COURT: Is that already in there?

12 MR. GORMAN: I did not see it, Your Honor.

13 MS. BATALLER-SCHNEIDER: I don't believe it is.

14 MR. GORMAN: I don't believe it was.

15 THE COURT: And that's 128?

16 MR. GORMAN: That's 128, Your Honor.

17 THE COURT: One point two-eight, right?

18 MR. GORMAN: That's correct, Your Honor, 1.28.

19 THE COURT: Okay.

20 MR. GORMAN: And the last is the insanity instruction,
21 Your Honor, 1.36.

22 THE COURT: 1.36. Government's response? Any
23 objection to the voluntariness of the confession instruction?
24 Ms. Martinez, do you want to argue this?

25 MR. CAYTON: To the voluntariness of the confession,

1 Your Honor, no objection. I think that's appropriate for the
2 jury to assess.

3 THE COURT: Okay.

4 MR. CAYTON: To the insanity, the Government does not
5 believe that the Defense has met its burden to earn that defense.

6 THE COURT: All right. And so I'm going to overrule
7 the objection. I'll include the insanity instruction.

8 MS. BATALLER-SCHNEIDER: Thank you.

9 THE COURT: We will include the voluntariness of
10 confession instruction by agreement. What about, there was
11 something -- oh, I saw something from the Government early on,
12 last week, about unanimity of -- was there some objection to
13 that?

14 MR. GREENBAUM: We would withdraw that, Your Honor. If
15 you want to have the discussion, but I think on that one I think
16 it was a nice concept, but I think we would withdraw that one,
17 Your Honor.

18 THE COURT: Okay.

19 MR. CAYTON: And I think we figured out why it was
20 coming up.

21 THE COURT: So it's out.

22 MR. CAYTON: It was there's two different ways you can
23 do child pornography for the interstate commerce.

24 THE COURT: Right. That was --

25 MR. CAYTON: We just deleted one of those so that we

1 don't have to worry about the unanimity and make it a log cleaner
2 I think.

3 THE COURT: Okay.

4 MR. CAYTON: Because that's just one of the most
5 confusing instructions ever.

6 THE COURT: Is there any questions left as far as how
7 they're -- if they're abandoning anything?

8 THE CLERK: The instruction on the autism. And then
9 there was another instruction.

10 MR. GREENBAUM: Oh, that was -- that was a preliminary
11 instruction. We resolved that, Your Honor.

12 THE COURT: Oh, okay. Okay. So what I want her to do
13 is print y'all copies of this, and then I'll come back and give
14 you ten minutes.

15 It's not going to be much different than what you
16 already had, and have had. So I'll give you about ten minutes to
17 review it. And I'll come back in and we'll put on the record,
18 we'll have a formal charge conference. Yes, sir?

19 MR. GORMAN: I'm sorry. I didn't want to interrupt
20 you.

21 The one objection we did raise and the Court did write
22 the instruction. If the Court's going to go with it, I just
23 wanted to put on the record, I think the proof of intent
24 instruction that the Court typically uses in the context of a
25 complex computer case can invite a jury to sort of assume

1 components of this.

2 And there would be a concern that that's essentially
3 evading the presumption of innocence. I also didn't think it was
4 tied specifically to a definition of the case. It more seems to
5 be a stand-alone instruction.

6 THE COURT: And the Defense objects to its inclusion?

7 MR. GORMAN: It would, Your Honor. Same objection we
8 originally offered.

9 THE COURT: What's your thought, Mr. Cayton?

10 MR. CAYTON: Do you have a copy of it?

11 MR. GREENBAUM: I do.

12 THE COURT: Yeah. I can take a look at it myself.

13 MR. GORMAN: It's not a pattern instruction.

14 (Pause)

15 THE COURT: Mr. Cayton, your response?

16 MR. CAYTON: Your Honor, the Government has no
17 objection to the instruction being included. I think that it
18 does have some relevance for the jury to understand this is a
19 general intent crime.

20 It's not a specific intent crime. But it does discuss
21 knowing and that generally someone is expected to know the
22 consequences of their actions. Knowing is a very specific
23 element of all these crimes. They had to knowingly distribute or
24 knowingly possess.

25 So the Government believes that the instruction is

1 okay. I understand the Court's opinion and the Defense opinion,
2 as well.

3 THE COURT: Mr. Gorman, I typically include it. It's
4 not a pattern. You don't want it in?

5 MR. GORMAN: I do not, Your Honor.

6 THE COURT: Government wants it in. All right. Let me
7 go back and look at it. I'll read it and reread it a couple of
8 times. And we typically allow it. I've allowed it over
9 objection several times. Not a child pornography case. So I'll
10 take a look at it.

11 So stand fast, and we'll get you a copy of what we're
12 going to --

13 MS. BATALLER-SCHNEIDER: Thank you.

14 MR. GREENBAUM: Thank you, Your Honor.

15 (Pause)

16 THE COURT: Oh, Mr. Cayton, Mr. Greenbaum?

17 MR. CAYTON: Yes, sir?

18 THE COURT: How much time do y'all want?

19 MR. GREENBAUM: There is a lot of counts, Judge, a lot
20 of counts, Your Honor. Thirty minutes, Judge, for closing, if
21 possible

22 THE COURT: The Defense okay with 30, or do you want
23 less or what?

24 MS. BATALLER-SCHNEIDER: 30 is fine, Your Honor. I
25 think it will probably be less. But just in case I need to

1 respond to something.

2 THE COURT: Is the -- are y'all splitting the time up?

3 MR. GREENBAUM: Yes, Your Honor. I was going to give,
4 Mr. Cayton is going to do the first half. It's going to be 16
5 minutes. I was going to do 14 minutes, Your Honor.

6 THE COURT: Okay. So, Mr. Cayton, you know you got to
7 go at least 15:01 or he starts losing time off of his, right?
8 You go tot go half.

9 MR. CAYTON: Your Honor, I just got told 16 for the
10 first time. But I've gone over an hour and a half on closing
11 before, if the Court is willing to give me the time.

12 THE COURT: We will not be doing that here. All right.
13 So knowing that 15 is your, sort of your mark, do you want a
14 warning at 13 or 14?

15 MR. CAYTON: One hundred percent, Your Honor, yes.

16 THE COURT: What time?

17 MR. CAYTON: Probably 13.

18 THE COURT: Thirteen?

19 MR. CAYTON: Give me a few minute warning.

20 THE COURT: A two minute warning there. And you can
21 keep going. Just because I warn you it's 13, I'll just tell you
22 you're taking 13 minutes, you keep going and take all of his
23 time. That's up to you all. That will be y'all's decision.

24 MR. CAYTON: Maybe people like to hear me talk, Your
25 Honor. I'm not sure.

1 THE COURT: No, no. But I'm just saying --

2 MR. GREENBAUM: Your Honor, can I get a two-minute
3 warning and a one-minute warning? I just, I don't ever want to
4 go over my time.

5 THE COURT: You're so needy. So you want what?

6 MR. GREENBAUM: A two-minute warning and a one-minute
7 warning so I know I have one minute to --

8 THE COURT: So you want one at 28 and another one at
9 29.

10 MR. GREENBAUM: Yes, ma'am. I mean yes, sir.

11 THE COURT: And then I get the hook.

12 MR. GREENBAUM: Yes. Yes, Your Honor.

13 THE COURT: Are y'all splitting your time up or --

14 MR. GORMAN: Your Honor, Ms. Bataler has wisely told
15 me to stop talking at this point. So she's taking it on herself.

16 MS. BATALER-SCHNEIDER: I was going to blame it on
17 you, but.

18 THE COURT: What kind of warning do you want? If
19 you're still talking at 28 minutes, do you want me to --

20 MS. BATALER-SCHNEIDER: That would be fine, Your
21 Honor. I'd be shocked if I'm still talking at 28 minutes. But
22 yes.

23 THE COURT: Okay. All right. Give us just a few
24 minutes. She's almost got them ready. I'll be back in ten and
25 we'll go -- and I left in the proof of intent for now. I think I

1 may take it out. We'll talk.

2 MS. BATALLER-SCHNEIDER: Thank you.

3 (Recess at 12:19 p.m./Reconvened at 12:50 p.m.)

4 (Outside the presence of the jury; defendant present)

5 THE COURT: Please be seated. Thank you. All right.
6 Outside the presence of the jury.

7 Everybody's received a copy of the Court's proposed
8 final -- I guess final draft of the proposed instructions.

9 For the Government, who wants to -- Mr. Greenbaum, are
10 there objections to the charge as it's proposed?

11 MR. GREENBAUM: No, Your Honor. No objection, Your
12 Honor. Thank you.

13 THE COURT: Any additional requests?

14 MR. GREENBAUM: Not at this time, Your Honor. Thank
15 you.

16 THE COURT: So the Government's happy with the Court's
17 charge as it exists?

18 MR. GREENBAUM: Yes, Your Honor. That's correct.

19 THE COURT: Mr. Gorman, same questions of you. Any
20 objections to the instruction, the Court's charge as proposed?

21 MR. GORMAN: None, Your Honor.

22 THE COURT: Any additional requests?

23 MR. GORMAN: No, Your Honor.

24 THE COURT: All right. Very well. Interesting verdict
25 form. You know, it's different than probably one most of us have

1 seen most of our careers. So, and I'll just -- just so you know,
2 you have the verdict form, copy of the verdict form. The jury
3 will have only the charge. They won't have the verdict form.

4 Ms. Lerma will take in the one verdict form that
5 they'll end up with. We won't let them have numerous verdict
6 forms. No reason to. I'll go through it very briefly and
7 explain to them, but nothing more than that.

8 Toward the end of my instructions, and I'll read down
9 to -- well, the next to last, I'll read through the next to last
10 page. When I get to Page 20, I'll just save that for when y'all
11 are done arguing and then we'll go from there.

12 Mr. Greenbaum, Mr. Cayton, anything further from you
13 all?

14 MR. GREENBAUM: No, Your Honor.

15 THE COURT: Ms. Bataller, Mr. Gorman?

16 MR. GORMAN: No, Your Honor.

17 THE COURT: We're good? Okay. If y'all would be back
18 here at five 'til two, we'll make it work. Mr. Perkins, did you
19 get to eat?

20 THE DEFENDANT: Not yet.

21 THE COURT: Okay. Not yet. We'll get you fed, and
22 make sure everybody gets fed. Thank y'all.

23 MR. GREENBAUM: Thank you, Your Honor.

24 MR. GORMAN: Thank you, Your Honor.

25 (Recess at 12:52 p.m./Reconvened at 1:59 p.m.)

1 (Outside the presence of the jury; defendant present)

2 THE COURT: Be seated, please.

3 (Pause)

4 THE COURT: All right. So we're back on the record
5 outside the presence of the jury. Mr. Greenbaum, Mr. Cayton, I
6 guess you got the next to last version. Ms. Salas has told you
7 exactly what we've changed. Any objections? We're good?

8 MR. GREENBAUM: No objection at all, Your Honor.

9 THE COURT: We're good?

10 MR. GREENBAUM: Yes, sir.

11 THE COURT: Okay. Ms. Bataller?

12 MS. BATALLER-SCHNEIDER: Yes.

13 THE COURT: Bataller?

14 MS. BATALLER-SCHNEIDER: I'll take it.

15 THE COURT: How do you say it?

16 MS. BATALLER-SCHNEIDER: Bataller.

17 THE COURT: Bataller.

18 MS. BATALLER-SCHNEIDER: So the double-l is like a y.
19 So Bataller.

20 THE COURT: Bataller. Okay. Are you good with the
21 charge?

22 MS. BATALLER-SCHNEIDER: Yes.

23 THE COURT: And the verdict form the way I did it?

24 MS. BATALLER-SCHNEIDER: Yes, Your Honor.

25 THE COURT: Instead of the circles. I thought it was

1 better to do that.

2 MS. BATALLER-SCHNEIDER: That's fine, Your Honor.
3 Thank you.

4 THE COURT: Actually, I have a third version I like
5 better, but I think it kind of conflicts with the pattern, the
6 way I do it.

7 MS. BATALLER-SCHNEIDER: Oh, okay.

8 THE COURT: I'll tell you all about that later.

9 MS. BATALLER-SCHNEIDER: Okay.

10 THE COURT: All right. So 30 minutes per side. I'm
11 sorry?

12 THE CLERK: We don't have copies of the verdict forms.

13 THE COURT: Oh, okay.

14 THE CLERK: I was going to go --

15 THE COURT: Did you show it to them though?

16 THE CLERK: Yes.

17 THE COURT: Okay.

18 THE CLERK: They did --

19 THE COURT: So she's going to get you copies of the
20 verdict form the way it actually appears in case you want to show
21 it to them or whatever.

22 MS. BATALLER-SCHNEIDER: Your Honor, while she's doing
23 that, can I just briefly run to the bathroom real quick?

24 THE COURT: Yeah, please do.

25 MS. BATALLER-SCHNEIDER: Thank you.

1 MR. CAYTON: Can I second that?

2 THE COURT: Wash your hands.

3 MS. BATALLER-SCHNEIDER: I will.

4 THE COURT: Wash your hands, everyone.

5 MR. CAYTON: I will.

6 (Pause)

7 THE COURT: All right. I think we're ready.

8 Everybody?

9 MS. BATALLER-SCHNEIDER: Yes, we're ready.

10 THE COURT: Let's bring the jury in please. Let's rise
11 for the jury.

12 (Jury in at 2:04 p.m.)

13 THE COURT: All right. Let's be seated, please.

14 Thank you. Welcome back. I hope you had a good lunch.

15 You found in your seats, as I promised you, your
16 Court's charge, Court's instructions to the jury. And you're
17 welcome to read along if you'd like. Everybody get your juror
18 badge back on if you can.

19 All right. Members of the jury, in any jury trial
20 there are in effect two judges. I'm one of the judges; the other
21 is the jury. It's my duty to preside over the trial and decide
22 what evidence is proper for your consideration. It's also my
23 duty at the end of the trial to explain to you the rules of law
24 that you must follow and apply in arriving at your verdict.

25 First, I'll give you some general instructions which

1 apply in every case, for example instructions about burden of
2 proof and how to judge the believability of witnesses. Then I'll
3 give you some specific rules of law about this particular case.
4 And finally, I'll explain to you the procedures you should follow
5 in your deliberations.

6 You as jurors are the judges of the facts. But in
7 determining what actually happened, that is in reaching your
8 decision as to the facts, it's your sworn duty to follow all the
9 rules of law as I explain them to you. You have no right to
10 disregard or give special attention to any one instruction or to
11 question the wisdom or the correctness of any rule I may state to
12 you.

13 You must not substitute or follow your own emotion or
14 opinion as to what the law is or ought to be. It's your duty to
15 apply the law as I explain it to you, regardless of the
16 consequences. It's also your duty to base your verdict solely
17 upon the evidence without prejudice or sympathy.

18 You are to decide this case only on the evidence which
19 has been admitted into court during trial. That was the promise
20 you made and the oath you took before being accepted by the
21 parties as jurors. And they have the right to expect nothing
22 less.

23 The indictment or formal charges against the defendant
24 are not evidence of guilt. Indeed, the defendant is presumed by
25 the law to be innocent. The defendant begins with a clean slate.

1 The law does not require the defendant to prove his innocence or
2 produce any evidence at all, and no inference whatever may be
3 drawn from the election of the defendant not to testify.

4 The Government has the burden of proving the defendant
5 guilty beyond a reasonable doubt. And if it fails to do so, you
6 must acquit the defendant. While the Government's burden of
7 proof is a strict or heavy burden, it is not necessary that the
8 defendant's guilt be proved beyond all possible doubt. It is
9 only required that the Government's proof exclude any reasonable
10 doubt concerning the defendant's guilt.

11 A reasonable doubt is a doubt based upon reason and
12 common sense after careful and impartial consideration of all of
13 the evidence in the case. Proof beyond a reasonable doubt,
14 therefore, is proof of such a convincing character that you would
15 be willing to rely and act upon it without hesitation in making
16 the most important decisions of your own affairs.

17 As I told you earlier, it's your duty to determine the
18 facts. To do so, you must consider only the evidence presented
19 during the trial. Evidence is the sworn testimony of the
20 witnesses including stipulations, and the exhibits. The
21 questions, statements, objections, and arguments made by the
22 lawyers are not evidence.

23 The function of the lawyers is to point out those
24 things that are most significant or most helpful to their side of
25 the case, and in so doing to call your attention to certain facts

1 or inferences that might otherwise escape your notice. In the
2 final analysis, however, it's your own recollection and
3 interpretation of the evidence that controls in the case. What
4 the lawyers say is not binding upon you.

5
6 During the trial, I sustained objections to certain
7 questions. You must disregard those questions entirely. Do not
8 speculate as to what the witness would have said if permitted to
9 answer the question. Also, certain testimony or other evidence
10 has been ordered removed from the record, and you have been
11 instructed to disregard this evidence.

12 Do not consider any testimony or other evidence which
13 has been removed from your consideration in reaching your
14 decision. Your verdict must be based solely on the legally
15 admissible evidence and testimony.

16 Also, do not assume from anything I may have done or
17 said during the trial that I have any opinion concerning any of
18 the issues in this case. Except for the instructions to you on
19 the law, you should disregard anything I may have said during the
20 trial in arriving at your own verdict.

21 In considering the evidence, you are permitted to draw
22 such reasonable inferences from the testimony and exhibits as you
23 feel are justified in the light of common experience. In other
24 words, you may make deductions and reach conclusions that reason
25 and common sense lead you to draw from the facts which have been

1 established by the evidence.

2 Do not be concerned about whether the evidence is
3 direct evidence or circumstantial evidence. You should consider
4 and weigh all of the evidence that was presented to you. Direct
5 evidence is the testimony of one who asserts actual knowledge of
6 a fact such as an eyewitness. Circumstantial evidence is proof
7 of a chain of events and circumstances indicating that something
8 is or is not a fact.

9 The law makes no distinction between the weight to be
10 given to either direct or circumstantial evidence, but the law
11 requires that you, after weighing all of the evidence whether
12 direct or circumstantial, be convinced of the guilt of the
13 defendant beyond a reasonable doubt before you can find him
14 guilty.

15 You've heard evidence of acts of the defendant which
16 may be similar to those charged in the indictment but which were
17 committed on other occasions. You must not consider any of this
18 evidence in deciding if the defendant committed the acts charged
19 in the indictment. However, you may consider the evidence for
20 other very limited purposes.

21 If you find beyond a reasonable doubt from other
22 evidence in this case that the defendant did commit the acts
23 charged in the indictment, then you may consider evidence of
24 similar acts allegedly committed on other occasions to determine
25 whether the defendant had the state of mind or intent necessary

1 to commit the crime charged in the indictment, or whether the
2 defendant committed the acts for which he is on trial by accident
3 or mistake. These are the limited purposes for which any
4 evidence of other similar acts may be considered.

5 In determining whether any statement claimed to have
6 been made by the defendant outside of court and after an alleged
7 crime has been committed was knowingly and voluntarily made, you
8 should consider the evidence concerning such a statement with
9 caution and great care. You should give such weight to the
10 statement as you feel it deserves under all the circumstances.

11 You may consider in that regard such factors as the
12 age, sex, training, education, occupation, and physical and
13 mental condition of the defendant, his treatment while under
14 interrogation, and all the other circumstances and evidence
15 surrounding the making of the statement.

16 I'll remind you that it is your job to decide whether
17 the Government has proved the guilt of the defendant beyond a
18 reasonable doubt. In doing so, you must consider all of the
19 evidence. This does not mean, however, that you must accept all
20 of the evidence as true or accurate.

21 You are the sole judges of the credibility or
22 believability of each witness, and the weight to be given to each
23 witness' testimony. An important part of your job will be making
24 judgments about the testimony of the witnesses who testified in
25 this case. You should decide whether you believe all, some part,

1 or none of what each person had to say, and how important that
2 testimony was.

3 In making that decision, I suggest that you ask
4 yourself some questions. Did the witness impress you as honest.
5 Did the witness have any particular reason not to tell the truth.
6 Did the witness have a personal interest in the outcome of the
7 case. Did the witness have any relationship with either the
8 Government or the Defense.

9 Did the witness seem to have a good memory. Did the
10 witness clearly see or hear the things about which he or she
11 testified. Did the witness have the opportunity and ability to
12 understand the questions clearly and answer them directly. Did
13 the witness' testimony differ from the testimony of other
14 witnesses. These are a few of the considerations that will help
15 you determine the accuracy of what each witness said.

16 Your job is to think about the testimony of each
17 witness you have heard and decide how much you believe of what
18 each witness had to say. In making up your mind in reaching a
19 verdict, do not make any decisions simply because there were more
20 witnesses on one side than on the other.

21 Do not reach a conclusion on a particular point just
22 because there were more witnesses testifying for one side on that
23 point. You'll always bear in mind that the law never imposes
24 upon a defendant in a criminal case the burden or duty of calling
25 any witnesses or producing any evidence.

1 During the trial, you heard the testimony of Special
2 Agent Antonio Yanez who expressed opinions concerning computer
3 forensics. You also heard the testimony of Dr. James Schutte who
4 expressed opinions concerning mental diseases and disorders and
5 his evaluation of the defendant.

6 If scientific, technical, or other specialized
7 knowledge might assist the jury in understanding the evidence or
8 in determining a fact in issue, a witness qualified by knowledge,
9 skill, experience, training, or education may testify and state
10 an opinion concerning such matters. Merely because such a
11 witness has expressed an opinion does not mean, however, that you
12 must accept this opinion.

13 You should judge such testimony like any other
14 testimony. You may accept it or reject it and give it as much
15 weight as you think it deserves, considering the witness'
16 education and experience, the soundness of the reasons given for
17 the opinion, and all other evidence in the case.

18 You're here to decide whether the Government has proved
19 beyond a reasonable doubt that the defendant is guilty of the
20 crimes charged. The defendant is not on trial for any act,
21 conduct, or offense not alleged in the indictment. Neither are
22 you called upon to return a verdict as to the guilt of any other
23 person or persons not on trial as a defendant in this case except
24 as you are otherwise instructed.

25 If the defendant is found guilty, it will be my duty to

1 decide what the punishment will be. You should not be concerned
2 with punishment in any way. It should not enter your
3 consideration or discussion.

4 You'll note that the indictment charges that the
5 offenses were committed on or about specified dates. The
6 Government does not have to prove that the crimes were committed
7 on those exact dates so long as the Government proves beyond a
8 reasonable doubt that the defendant committed the crimes on dates
9 reasonably near September 27th, 2019 to October 1st, 2019 and
10 January 9th, 2020, the dates stated in the indictment.

11 A separate crime is charged in each count of the
12 indictment. Each count and the evidence pursuant to it should be
13 considered separately. The fact that you may find the defendant
14 guilty or not guilty as to one of the crimes charged should not
15 control your verdict as to any other.

16 The indictment contains multiple counts which reads as
17 follows. From September 27th, 2019 to October 1st, 2019, within
18 the Western District of Texas and elsewhere, the defendant Thomas
19 Scott Perkins did knowingly distribute child pornography as
20 defined in Title 18 United States Code Section 2256(8)(A), that
21 has been shipped or transported in or affecting interstate or
22 foreign commerce by any means including by computer all in
23 violation of Title 18 United States Code Section 2252A(a)(2).

24 Count 2, on or about January 9th, 2020, in the Western
25 District of Texas, the defendant Thomas Scott Perkins did

1 knowingly possess material, specifically a Western Digital hard
2 drive Model Number WD800, Serial Number WD-WCAJ92661471, that
3 contains images of child pornography as defined in Title 18
4 United States Code Section 2256(8)(A) that involved a
5 prepubescent minor under the age of 12 years that had been
6 mailed, shipped, and transported in interstate and foreign
7 commerce, was produced using materials which had been shipped and
8 transported in interstate and foreign commerce by any means
9 including by computer, all in violation of Title 18 United States
10 Code Section 2252A(a)(5)(B).

11 Count 3, on or about January 9th, 2020, in the Western
12 District of Texas, the defendant Thomas Scott Perkins did
13 knowingly possess material, specifically a Maxtor hard drive
14 device model Diamondmax Plus 9, Serial Number Y45BC9XE that
15 contains images of child pornography as defined in Title 18
16 United States Code Section 2256(8)(A) that involved a
17 prepubescent minor under the age of 12 years that had been
18 mailed, shipped, and transported in interstate and foreign
19 commerce, was produced using materials which had been shipped and
20 transported in interstate and foreign commerce by any means
21 including by computer, all in violation of Title 18 United States
22 Code Section 2252A(a)(5)(B).

23 Count 4, on or about January 9th, 2020, in the Western
24 District of Texas, the defendant Thomas Scott Perkins did
25 knowingly possess material, specifically a Seagate hard drive

1 device model ST1000LM049, Serial Number WGS5QBVZ that contains
2 images of child pornography as defined in Title 19 United States
3 Code Section 2256(8) (A) that involved a prepubescent under the
4 age of 12 years that had been mailed, shipped, and transported in
5 interstate and foreign commerce, was produced using materials
6 which had been shipped and transported in interstate and foreign
7 commerce by any means including by computer, all in violation of
8 Title 18 United States Code Section 2252A(a) (5) (B) .

9 Count 5, on or about January 9th, 2020, in the Western
10 District of Texas, the defendant Thomas Scott Perkins did
11 knowingly possess material, specifically a Seagate hard drive
12 device model SRDONF2, Serial Number is NA8EYNL7 that contains
13 images of child pornography as defined in Title 18 United States
14 Code Section 2256(8) (A) that involved a prepubescent minor under
15 the age of 12 years that had been mailed, shipped, and
16 transported in interstate and foreign commerce, was produced
17 using materials which had been shipped and transported in
18 interstate and foreign commerce by any means including by
19 computer, all in violation of Title 18 United States Code Section
20 2252A(a) (5) (B) .

21 Count 6, on or about January 9th, 2020, in the Western
22 District of Texas, the defendant Thomas Scott Perkins did
23 knowingly possess materials, specifically a Seagate hard drive
24 device model SRDOPV1, serial number NA9Q02S9 that contains images
25 of child pornography as defined in Title 18 United States Code

1 Section 2256(8) (A) that involved a prepubescent minor under the
2 age of 12 years that had been mailed, shipped, and transported in
3 interstate and foreign commerce, was produced using materials
4 which had been shipped and transported in interstate and foreign
5 commerce by any means including by computer, all in violation of
6 Title 18 United States Code Section 2252A(a) (5) (B) .

7 Count 7, on or about January 9th, 2020, in the Western
8 District of Texas, the defendant Thomas Scott Perkins, did
9 knowingly possess material, specifically a Western Digital hard
10 drive, device model WDBYFT0040BBK-OA, Serial Number WX51D961NE27
11 that contains images of child pornography as defined in Title 18
12 United States Code Section 2256(8) (A) that involved a
13 prepubescent minor under the age of 12 years that had been
14 mailed, shipped, and transported in interstate and foreign
15 commerce, was produced using materials which had been shipped and
16 transported in interstate and foreign commerce by any means
17 including by computer, all in violation of Title 18 United States
18 Code Section 2252A(a) (5) (B) .

19 Count 8, on or about January 9th, 2020, in the Western
20 District of Texas, the defendant Thomas Scott Perkins did
21 knowingly possess material, specifically a Samsung hard drive,
22 Serial Number S267J1LZ503188, that contains images of child
23 pornography as defined in Title 18 United States Code Section
24 2256(8) (A) that involved a prepubescent minor under the age of 12
25 years that had been mailed, shipped, and transported in

1 interstate and foreign commerce, was produced using materials
2 which had been shipped and transported in interstate and foreign
3 commerce by any means, including by computer, all in violation of
4 Title 18 United States Code Section 2252A(a) (5) (B) .

5 Count 9, on or about January 9th, 2020, in the Western
6 District of Texas, the defendant Thomas Scott Perkins did
7 knowingly possess material, specifically a SimpleTech hard drive
8 device model 96300-41001-68, Serial Number 09335092000206005 that
9 contains images of child pornography as defined in Title 18
10 United States Code Section 2256(8) (A) that involved a
11 prepubescent minor under the age of 12 years that had been
12 mailed, shipped, and transported in interstate and foreign
13 commerce, was produced using materials which had been shipped and
14 transported in interstate and foreign commerce by any means
15 including by computer, all in violation of Title 18 United States
16 Code Section 2252A(a) (5) (B) .

17 Title 18 United States Code Section 2252A(a) (2) (A)
18 makes it a crime to knowingly distribute any child pornography
19 that has been mailed or using any means or facility of interstate
20 or foreign commerce shipped or transported in or affecting
21 interstate or foreign commerce by any means including by
22 computer.

23 If you do find the defendant guilty of Count 1, you
24 must be convicted that the Government has proved each of the
25 following beyond a reasonable doubt. First, that the defendant

1 knowingly distributed items of child pornography as alleged in
2 the indictment. Second, that the items of child pornography had
3 been shipped or transported in, or affecting interstate or
4 foreign commerce by any means including by computer. And third,
5 that when the defendant distributed the items, the defendant knew
6 the items were child pornography.

7 To distribute something simply means to deliver or
8 transfer possession of it to someone else with or without any
9 financial interest in the transaction. The term computer means
10 an electronic, magnetic, optical, electrical chemical, or other
11 high speed data processing device performing logical, arithmetic,
12 or storage functions, and includes any data storage facility or
13 communications facility directly related to or operating in
14 conjunction with such device, but such term does not include an
15 automated typewriter or typesetter, a portable hand held
16 calculator, or other similar device.

17 The term child pornography means any visual depiction,
18 including any photograph, film, video, picture, or computer or
19 computer generated image or picture, whether made or produced by
20 electronic, mechanical, or other means by sexually explicit
21 conduct where the production of such visual depiction involves
22 the use of a minor engaging in sexually explicit conduct. The
23 parties have agreed that the material shown during trial
24 constitutes child pornography as a matter of law.

25 Interstate commerce means the commerce or travel

1 between one state, territory, or possession of the United States
2 and another state, territory, or possession of the United States
3 including the District of Columbia. Foreign commerce means
4 commerce or travel between any part of the United States
5 including its territorial waters, and any other country including
6 its territorial waters.

7 Title 18 United States Code Section 2252A(a) (5) (B)
8 makes it a crime to knowingly possess any book, magazine,
9 periodical, film, videotape, computer disc, or any other material
10 that contains an image of child pornography that has been mailed,
11 shipped, or transported using any means or facility of or in or
12 affecting interstate or foreign commerce including by computer.

13 For you to find the defendant guilty of Count 2, you
14 must be convinced that the Government has proved each of the
15 following beyond a reasonable doubt. That the defendant
16 knowingly possessed an item, a Western Digital hard drive model
17 number WD800, Serial Number WD-WCAJ92661471, that contains an
18 image of child pornography as alleged in the indictment.

19 Second, that the material was mailed, shipped, or
20 transported in or affecting interstate or foreign commerce by any
21 means including by computer. And third, that when the defendant
22 possessed the material, the defendant knew the material contained
23 child pornography.

24 For you to find the defendant guilty of Count 3, you
25 must be convinced that the Government has proved each of the

1 following beyond a reasonable doubt. First, that the defendant
2 knowingly possessed an item, a Maxtor hard drive model Diamondmax
3 Plus 9, Serial Number Y45BC9XE that contains an image of child
4 pornography as alleged in the indictment.

5 Second, that the material was mailed, shipped, or
6 transported in or affecting interstate or foreign commerce by any
7 means including by computer. And third, that when the defendant
8 possessed the material, the defendant knew the material contained
9 child pornography.

10 For you to find the defendant guilty of Count 4, you
11 must be convinced that the Government has proved each of the
12 following beyond a reasonable doubt. First, that the defendant
13 knowingly possessed an item, a Seagate hard drive device model
14 ST1000LMO49, Serial Number WGS5QBVZ that contains an image of
15 child pornography as alleged in the indictment.

16 Second, that the material was mailed, shipped, or
17 transported in or affecting interstate or foreign commerce by any
18 means including by computer. And third, that when the defendant
19 possessed the material, the defendant knew the material contained
20 child pornography.

21 For you to find the defendant guilty of Count 5, you
22 must be convinced that the Government has proved each of the
23 following beyond a reasonable doubt. First, that the defendant
24 knowingly possessed an item, a Seagate hard drive device model
25 SRDONF2, Serial Number NA8EYNL7 that contains an image of child

1 pornography as alleged in the indictment.

2 Second, that the material was mailed, shipped, or
3 transported in or affecting interstate or foreign commerce by any
4 means including by computer. And third, that when the defendant
5 possessed the material, the defendant knew the material contained
6 child pornography.

7 For you to find the defendant guilty of Count 6, you
8 must be convinced that the Government has proved each of the
9 following beyond a reasonable doubt. First, that the defendant
10 knowingly possessed an item, a Seagate hard drive device model
11 SRDOPV1, serial number NAQ02S9 that contains an image of child
12 pornography as alleged in the indictment.

13 Second, that the material was mailed, shipped, or
14 transported in or affecting interstate or foreign commerce by any
15 means including by computer. And third, that when the defendant
16 possessed the material, the defendant knew the material contained
17 child pornography.

18 For you to find the defendant guilty of Count 7, you
19 must be convinced that the Government has proved each of the
20 following beyond a reasonable doubt. First, that the defendant
21 knowingly possessed an item, a Western Digital hard drive, device
22 model WDBYFT0040BBK-O8, Serial Number WX51D961NE27 that contains
23 an image of child pornography as alleged in the indictment.

24 Second, that the material was mailed, shipped, or
25 transported in or affecting interstate or foreign commerce by any

1 means including by computer. And third, that when the defendant
2 possessed the material, the defendant knew the material contained
3 child pornography.

4 For you to find the defendant guilty of Count 8, you
5 must be convinced that the Government has proved each of the
6 following beyond a reasonable doubt. First, that the defendant
7 knowingly possessed an item, a Samsung hard drive, Serial Number
8 S267J1LZ503188 that contains an image of child pornography as
9 alleged in the indictment.

10 Second, that the material was mailed, shipped, or
11 transported in or affecting interstate or foreign commerce by any
12 means including by computer. And third, that when the defendant
13 possessed the material, the defendant knew the material contained
14 child pornography.

15 For you to find the defendant guilty of Count 9, you
16 must be convinced that the Government has proved each of the
17 following beyond a reasonable doubt. First, that the defendant
18 knowingly possessed an item, a SimpleTech hard drive device
19 number 96300-41001-68, Serial Number 09335092000206005 that
20 contains an image of child pornography as alleged in the
21 indictment.

22 Second, that the material was mailed, shipped, or
23 transported in or affecting interstate or foreign commerce by any
24 means including by computer. And third, that when the defendant
25 possessed the material, the defendant knew the material contained

1 child pornography.

2 The definitions of child pornography, computer,
3 interstate commerce, and foreign commerce provided for Count 1
4 apply to Counts 2 through 9 as well. Possession, as that term is
5 used in these instructions, may be one of two kinds, actual
6 possession or constructive possession.

7 A person who knowingly has direct physical control over
8 a thing at a given time is in actual possession of it. A person
9 who although not in actual possession knowingly has both the
10 power and intention at a given time to exercise dominion or
11 control over a thing, either directly or through another person
12 or persons, is in constructive possession of it.

13 Possession may be sole or joint. If one person alone
14 has actual or constructive possession of a thing, possession is
15 sole. If two or more persons share actual or constructive
16 possession of a thing, possession is joint. You may find that
17 the element of possession is present if you find beyond a
18 reasonable doubt that the defendant had actual or constructive
19 possession either alone or jointly with others.

20 The word knowingly as that term has been used from time
21 to time in these instructions means that the act was done
22 voluntarily and intentionally, not because of a mistake or
23 accident. The defendant claims he was insane at the time of the
24 events alleged in the indictment. If you conclude that the
25 Government has proved beyond a reasonable doubt that the

1 defendant committed the crime as charged, you must then consider
2 whether the defendant should be found not guilty only by reason
3 of insanity.

4 For you to find the defendant not guilty only by reason
5 of insanity, you must be convinced that the defendant has proven
6 the following by clear and convincing evidence. First, that at
7 the time of the crime, defendant suffered from a severe mental
8 disease or defect, and second that because of a severe mental
9 disease or defect, the defendant was unable to appreciate the
10 nature and quality of his acts, or was unable to appreciate that
11 his acts were wrong.

12 Mental disease or defect do not otherwise constitute a
13 defense. On the issue of insanity, as the defendant who must
14 prove his insanity by clear and convincing evidence. You should
15 render a verdict of not guilty only by reason of insanity if you
16 are persuaded by clear and convincing evidence that the defendant
17 was insane when the crime was committed.

18 Clear and convincing evidence is evidence that makes it
19 highly probable that defendant had a severe mental disease, and
20 as a result was unable to appreciate the nature and quality and
21 the wrongfulness of his acts. Such proof must be sufficient to
22 produce a firm belief or conviction as to the truth of both
23 elements of the defense.

24 Remember then that there are three possible verdicts in
25 this case, guilty, not guilty, and not guilty only by reason of

1 insanity. No matter which verdict you choose, your vote must be
2 unanimous as to this verdict. To reach a verdict, whether it is
3 guilty or not guilty, all of you must decide. Your verdict must
4 be unanimous on each count of the indictment. Your deliberations
5 will be secret. You will never have to explain your verdict to
6 anyone.

7 It's your duty to consult with one another and to
8 deliberate in an effort to reach agreement if you can do so.
9 Each of you must decide the case for yourself, but only after an
10 impartial consideration of the evidence with your fellow jurors.

11 During your deliberations, do not hesitate to reexamine
12 your own opinions and change your mind if convinced that you were
13 wrong. But do not give up your honest beliefs as to the weight
14 or effect of the evidence solely because of the opinion of your
15 fellow jurors, or for the mere purpose of returning a verdict.

16 Remember at all times you are the judges of the facts.
17 Your duty is to decide whether the Government has proved the
18 defendant guilty beyond a reasonable doubt. When you go to the
19 jury room, the first thing you should do is select one of your
20 number as your foreperson who will help to guide your
21 deliberations and will speak for you here in the courtroom.

22 A verdict form has been prepared for your convenience.
23 The foreperson will write the unanimous answer of the jury in the
24 space provided for each count of the indictment, either guilty or
25 not guilty, at the conclusion of your deliberation. The

1 foreperson should date and sign the verdict.

2 Now what you don't have is the verdict form. And I'm
3 showing that to you now. It's three pages. And what'll happen,
4 you've got your own copy of your charge. Before the door closes
5 after you all go retire to deliberate, Ms. Lerma will hand to
6 you, hand in the verdict form, one verdict form.

7 And it says verdict form. Check not guilty or guilty,
8 or not guilty by reason of insanity for each count. You know you
9 have three choices in each count. You'll pick one that you
10 unanimously agree.

11 Count 1 says we the jury find that defendant Thomas
12 Scott Perkins is, and there's a place beside not guilty, there's
13 a place by guilty, and there's a place by not guilty only by
14 reason of insanity. The foreperson -- and it says of the offense
15 charged in Count 1 of the indictment.

16 That's the way it is through every count, 1, 2, 3, 4,
17 5, 6, 7, 8, 9. The foreperson should initial next to whichever
18 verdict is the unanimous verdict in each count of the jury. At
19 the very bottom there's a place to date, then sign for the
20 foreperson.

21 Then there will be some large envelopes back in the
22 jury room. The foreperson will then slide the completed verdict
23 form into that envelope and seal it. Maintain control of it.
24 Foreperson should knock or have someone knock on the door to
25 alert the court security officer that the jury has reached a

1 unanimous verdict.

2 We'll get everybody back in here. You all will come
3 back out together like you've done so many times already. The
4 foreperson will come in, walking in carrying that envelope with
5 the verdict form contained in it. All right?

6 With that, I'm going to recognize Mr. Cayton to open
7 our closing arguments. Mr. Cayton, you may proceed.

8 MR. CAYTON: Thank you, Your Honor.

9 THE COURT: Yes, sir.

10 CLOSING ARGUMENT BY THE GOVERNMENT

11 MR. CAYTON: Good afternoon, ladies and gentlemen. At
12 the beginning of this trial, the Defense told you that this was a
13 case about perception. So I'd like to talk to you a little bit
14 about the defendant's perception when his house was initially
15 searched, or in his words raided.

16 He said what's going on. Anything you got, you got
17 illegally because there is no way you got past my VPNs. Officers
18 had just gone into his house. No one had told him why they were
19 there. No one had elicited any questions from him. So his
20 perception was there's officers here, I know I've been doing
21 something wrong, and I finally got caught.

22 He actually tells Agent Wilson when she's interviewing
23 him I've been doing this for so long, I knew eventually I was
24 going to get raided. Now, that's not the state of mind of
25 someone who doesn't know they're doing wrong. That's not the

1 state of mind of someone who believes that what they're doing is
2 okay. As much as he wants to say I have a right to delete stuff
3 whenever I want, that's the state of mind of someone who knows
4 that they had been unlawfully possessing and distributing child
5 pornography.

6 Now, the Judge just read you a whole lot of
7 instructions. I get it. But I want to focus on the elements of
8 each offense because that's what the Government has to prove.
9 And I would charge to you that the Government has proven each and
10 every element of these offenses beyond a reasonable doubt.

11 But I'd like to start with Count 1. And Count 1 is
12 distribution of child pornography. And there's three elements,
13 that the defendant knowingly distributed items of child
14 pornography as alleged in the indictment. Well, he had VPNs, he
15 knew he was doing illegal stuff on the internet. But let's talk
16 about that interview with Agent Ferg.

17 We got to listen to the whole thing. And he told Agent
18 Ferg I should have turned off that setting. Agent Ferg asked, he
19 said, you know, the defendant said I never shared any of my own
20 stuff. Well, what about the stuff you've been downloading. I
21 should have turned off that setting.

22 You heard a lot of testimony about peer-to-peer
23 software, about how it works. We got to see a little video on
24 BitTorrent. You also got to hear from Special Agent Bonneau who
25 told you about the BitTorrent software and that the law

1 enforcement software is different. The law enforcement software
2 doesn't share, so therefore it's a low priority.

3 If you want to get better downloads, if you want to get
4 more downloads, you share. Law enforcement can't distribute
5 child pornography. But the defendant could. And that way he
6 could get more downloads.

7 But you heard from Special Agent Bonneau that he
8 received 17 pieces of child pornography from the defendant. He
9 was contacted by Special Agent Ferg who reached out and said hey,
10 what's going on with this IP address, with these images, with
11 these videos. That was sent through secure means, and Special
12 Agent Ferg had a chance to review it. He reviewed 17 videos
13 containing child pornography.

14 We know those came from the defendant's computer
15 because when the forensic analysis was later done of the laptop,
16 L2H1, and you remember from Government Exhibit 3 when there's
17 some pictures of the search warrant, that silver laptop L2H1 was
18 sitting right in front of the TV in the front living room hooked
19 up to a bunch of drives.

20 So on that laptop, they found 15 of those 17 videos
21 that were downloaded from Special Agent Bonneau. So we know that
22 there was distribution, and we know it was knowing because he
23 knew he was sharing, he knew what was going on. While he was
24 trying to get more child pornography, he had it available in his
25 downloads folder until he got a chance to get around to

1 organizing his stuff because he should get to organize his stuff
2 whenever he wants, at least that's what he thinks. But that's
3 not what the law says. And you've heard the law from the Judge.

4 Item number two, that the items of child pornography
5 had been shipped or transported in or affecting interstate
6 commerce or foreign commerce by any means including by computer.
7 We know it was done by computer. We got to hear a lot about
8 BitTorrent. We all learned a lot this week.

9 But you heard from Special Agent Yanez each and every
10 one of those drives was manufactured outside of this country.
11 Each and every one of those drives that he was storing that
12 information on, that that information was being sent away from
13 came from Asia, actually.

14 The drive for Count 2, the Western Digital hard drive
15 came from Thailand. Count 3, that drive came from Singapore.
16 Count 4, the drive that was in L2H1 that was distributing the
17 child pornography, that came from China. Count 5, that drive
18 came from Thailand, Count 6 from China, Count 7, Malaysia, Count
19 8, Korea, and Count 9, China.

20 Interstate commerce was affected by the defendant's
21 distribution and also possession of child pornography. Count
22 number 2, just think of these as a little checklist you have.
23 Count 1, we checked it off. We know he was knowingly
24 distributing. Count 2, checked off because interstate commerce
25 was involved.

1 And Count 3, that when the defendant distributed these
2 items he knew the items were child pornography. You heard almost
3 an hour on the recorded interview where he talked about he viewed
4 the material. He had set some aside for deletion. He would
5 decide when he was going to delete it later. He had ten years of
6 material, but he looked at it once, at least once. He knew it
7 was there.

8 He would look at it and decide he was going to organize
9 it at a later time. He knew that it was child pornography when
10 he allowed it to be distributed, when he distributed it from his
11 computer when he shared it, however you want to phrase it. Count
12 1, Count 1 has been satisfied.

13 So we go to Counts 2 through 9. And obviously all of
14 these are very similar. The difference is the hard drive that's
15 listed because we had eight different hard drives that were
16 analyzed that had child pornography on them. And we watched that
17 together. We watched the videos that came from those devices.

18 And this is --we'll go through the elements, and then
19 we can talk a little bit about those videos. But Count 1, or
20 sorry, element one, that the defendant knowingly possessed an
21 item, a Maxtor hard drive device model Diamondmax Plus 9, Serial
22 Number Y45BC9XE that contains an image of child pornography.

23 Well we know he possessed the drive. That came from
24 one of the desktops. We got to hear a lot of testimony about the
25 desktops being seized from the house, how it was taken to the

1 computer forensics analyst. He removed the hard drive and that's
2 the Maxtor hard drive. This is Count 3. Yeah. So this is
3 Count 3.

4 So this is the Maxtor hard drive. So this is also
5 desktop. He removed the hard drive, he subjected it to computer
6 forensic analysis. He used a write blocker to make sure none of
7 the data was changed. The analyst was not changing anything on
8 that drive. Everything that was coming out of there is how it
9 was when the defendant possessed it on January 9th.

10 And what did he find? Well, for Count 2, and that's
11 the Western Digital hard drive, WD800, but we can use those same
12 elements, that's fine. He found 6,026 images and 17 videos. And
13 we had an opportunity to see the video that was shown in Court
14 today for Count 2 was titled four-year-old PTHC re gold reel.
15 And it showed approximately a four-year-old girl being vaginally
16 penetrated by an adult male.

17 For Count 3, that was the Maxdor hard drive, that had
18 6,402 images and 115 videos. You also had an opportunity to see
19 one of those videos. That was king pass new 022 Asian PTHC Thai
20 eight-year-old Cambodian boom-boom. And we got to see an
21 approximately eight-year-old girl who was bound with her wrists
22 to her knees, what appeared to be a man holding a dripping candle
23 over her vagina.

24 Count 4 was the Seagate hard drive Serial Number
25 WGS5QBVZ. Otherwise the elements are the same. And that had

1 boy06 and also the boy05 video that we talked about with the
2 distribution. But it also contained the video of boy06. And we
3 saw a small clip of that video. It was pretty blurry, but you
4 heard Agent Ferg testify that it was a bound young man who was
5 being forced to perform oral sex and also anally penetrated.

6 And that's just a few of the counts with the first
7 element. But let's go to the second element because it's the
8 same as distribution. That the material was mailed, shipped, or
9 transported in or affecting interstate or foreign commerce by any
10 means including by computer. The materials the hard drive
11 possesses the child pornography. And we already talked about
12 where every single one of these hard drives were made.
13 Interstate commerce was involved in this case.

14 Interstate commerce comes into effect because the
15 federal government has jurisdiction over interstate commerce. So
16 we have to make sure interstate commerce was involved. But it
17 doesn't mean he has to be mailing this stuff out from his house
18 and charging people money for it and putting stamps on it. It
19 doesn't have to go there. It's just the fact that he was using
20 devices that were in interstate commerce when he possessed this
21 material, when he distributed this material.

22 So Count 2 is checked off. Count 3, this is also the
23 same as distribution, that at the time the defendant possessed
24 the material, he knew it contained child pornography. And we go
25 back to that interview. He looked at the stuff. Yeah, he was

1 collecting it. Yeah, he was organizing it. Yeah, that was
2 something he wanted to do.

3 But he knew what he was doing. And he knew what he was
4 doing so much that he was taking measures to ensure that he
5 didn't get caught. Now we'll talk about that a little bit later,
6 but that first statement out of his mouth, how did you find me,
7 right? Couldn't have done this because I was using two different
8 VPNs.

9 So we ended on Count 4 for element one, and I'll get
10 through those real quick and we'll talk some more about some
11 different topics. But for Count 5, that's a Seagate hard drive,
12 NA8EYNL7. And that was a video titled dad on daughter full
13 penetration sex. And we all saw a small portion of that video.
14 It's exactly what the title describes.

15 And we heard some testimony on cross that sometimes
16 people can change the titles. I challenge you after seeing those
17 videos to think that any of these titles are inappropriate.

18 Count 6 was material possessed on a Seagate hard drive,
19 Serial Number NA9QO2S9. And that was a video. And we saw a
20 small clip of it's entitled PTHC Tara brand new. And we saw a
21 small clip of a young girl, definitely under the age of 12,
22 wearing what appears to be a Mardi Gras mask being forced to
23 perform oral copulation on an adult male.

24 That device contained 396 images and six videos. Count
25 5's device contained 125 videos and 180 images. Count 4's

1 contained 97 videos, no images. Count 7 was the Western Digital
2 hard drive Serial Number WX51D961NE27. It contained 34 images
3 and two videos. Another external hard drive. That was Ulia 27.
4 That was a little girl under the age of 12 who was naked in what
5 appeared to be in a kitchen with her legs spread open.

6 Count 8, another external hard drive. It just
7 contained one image. That image was of a girl under 12 --

8 THE COURT: Mr. Cayton, it's 13 minutes.

9 MR. CAYTON: Thank you, Your Honor. Naked. And Count
10 9 was the Simple Tech hard drive 09335092000206005 that contained
11 82,274 images and 840 videos. That's that big brick of a hard
12 drive sitting right there.

13 And we got to see PTHC new06 loving Lily three-year-old
14 with a three-year-old on the bed being raped. We also talked a
15 little bit about some other videos that were found on the drive,
16 and we heard from the FBI agent who testified that he knew two
17 victims from videos that were found on these drives.

18 And those videos were found on multiple drives, both
19 USB-3 and 12 for awesome preteen compilation and for the video
20 titled PTHC Kelly eight-year-old. That was on C2H1, USB-3 and
21 USB-12. And he described to you how these kids ended up in these
22 videos.

23 Now, ladies and gentlemen, like I said, we heard the
24 audio recording of the interview. The defendant made several
25 statements. And he tried to be protective with his words. He

1 told agents I know what you want me to say, but I'm not going to
2 say it. I'm only going to speak in general terms.

3 Does that sound like someone who didn't know what they
4 were doing was illegal and wrong? No. That's someone who knows
5 that what they did was wrong. They knew from the very minute the
6 police hit that door that they had finally got caught like he
7 told Agent Wilson. And he knew he had to be careful. He had to
8 try to couch his words, make it sound like he wasn't really
9 responsible.

10 I had a right to delete it. I was going to get around
11 to it. I have about ten years worth of material. And you know,
12 he told agents that he was going to actually get around to
13 deleting it that same day that they hit his house. He had been
14 possessing it for a long time, but that day was the day he was
15 finally going to decide to go through all those drives and get
16 rid of the child pornography that he knew he possessed.

17 No. There's a lot of admissions in there, but there's
18 a lot of also statements where he's trying not to be responsible
19 for what he knows he did. And that's definitely something that
20 you can consider.

21 We also heard from the computer forensics analyst. And
22 you can see, you heard it from some of the file names and the
23 file structure. He was moving these files around. He told the
24 agents he was moving them around. I would sort them and move
25 them around and when I got around to deleting them I decide to do

1 it.

2 But he knew he was possessing them when he was moving
3 them around. He was saving them. He wasn't trying to delete
4 them, he was trying to save them. And that's why there's all
5 those devices, all those external drives, 30 terabytes of data,
6 100,000 images or videos. That's why all of that is on there is
7 because he was saving it because he knew what it was and he
8 wanted to keep it.

9 The Government has proven beyond a reasonable doubt
10 each and every one of these charges, each and every element.
11 Thank you.

12 THE COURT: Thank you, Mr. Cayton.

13 Ms. Bataller?

14 CLOSING ARGUMENT BY THE DEFENDANT

15 MS. BATALLER-SCHNEIDER: Thank you. Sometimes mentally
16 ill people do very unpleasant things, things we don't understand,
17 things we personally would never do. But sometimes they do them
18 not because they're evil, but because they're mentally ill.

19 As I told you all in my opening statement, Thomas
20 understands the world through a different lense than you and I
21 do. His reality is informed by both his Autism Spectrum Disorder
22 and his Schizoaffective Disorder. You must fully understand his
23 unique experiences and challenges to understand this case.

24 When you understand this, it becomes clear that Thomas
25 could not have knowingly possessed or distributed child

1 pornography in the way the Government must prove. But even if it
2 could prove all of the elements of this case, we have shown you
3 that Thomas was insane from a legal standpoint.

4 To prove insanity, we must show that Thomas suffered
5 from a severe mental disease or defect, and that as a result
6 Thomas was unable to appreciate that his acts were wrong. Let's
7 talk first about Dr. Schutte's testimony that you heard today.

8 You heard evidence from Dr. Schutte that Thomas has a
9 severe mental illness which is Schizoaffective Disorder. He
10 hears voices, and he thinks that he's regularly having sex with a
11 demon. He actually feels it. That is a tactile hallucination.
12 That illness is real. And there is no expert testimony to
13 dispute it.

14 He also has an Autism Spectrum Disorder in which people
15 tend to have poor social skills, may seem odd to others, collect
16 things without meaning, and engage in repetitive behaviors over
17 and over. And that's exactly what Thomas did.

18 These mental illnesses are real. Dr. Schutte testified
19 that Thomas is not faking anything. And there is no evidence
20 that he's doing this to pretend he has some illness that he does
21 not have. These are mental illnesses Thomas legitimately has,
22 and they are the reason that he's sitting here today.

23 But it's not just Dr. Schutte's testimony that shows
24 this. The reality is that Thomas cannot escape his autism or his
25 Schizoaffective Disorder. It is with him wherever he goes. And

1 as a result, it informs every aspect of this case.

2 You heard at his interrogation with Agent Ferg, early
3 on in the interrogation, as soon as he was confronted with
4 downloading or questions about downloading, he admits it. He
5 doesn't try to hide his actions. He doesn't blame anyone else.

6 And he says he's going to get around to deleting these
7 things, a fact which is actually borne out by the forensic
8 analyst testifying that only around one percent of the things
9 were deleted. Ask yourself, does that sound to you like someone
10 who understands the wrongfulness of his actions?

11 You heard his obsessive behaviors when he talks about
12 being addicted to the act of downloading things, and watching
13 them upload and download just for the sake of watching it.
14 Obsessively hoarding information just like he hoards devices and
15 YouTube accounts. Does that sound like someone who understands
16 the wrongfulness of his actions, or knew exactly what he was
17 doing?

18 You heard it when Agent Ferg says he received
19 information that Thomas was living with his parents, staying home
20 and not able to drive or even work because of his disabilities.
21 Does that sound like someone who could understand the
22 wrongfulness of his actions like you and I can?

23 And you heard it in his interrogation with Agent Wilson
24 when he told you that he had a psychological evaluation and was
25 put on disability afterwards, and that he has a sex demon that he

1 can feel actually have sex with him. Does that sound like
2 someone who can understand reality, let alone understand the
3 wrongfulness of his actions?

4 The Government tries to tell you that Thomas is smart
5 enough to understand what he's doing. But intelligence is too
6 narrow of an analysis here. Though people with Autism Spectrum
7 Disorder and Schizoaffective Disorders can be smart in many
8 respects, their disorder directly impacts their ability to
9 understand reality.

10 This becomes apparent when you look more closely into
11 the Government's arguments. Though Agent Ferg repeatedly tells
12 Thomas that he's tech savvy, Thomas never once uses that word to
13 describe himself. He doesn't even know how to pronounce the name
14 of the program that he uses. And he's not able to give more than
15 a basic explanation of what these programs do. He doesn't have a
16 bitlocker which you've heard testimony that that's something that
17 a more complex user of technology would know how to do.

18 And the Government makes a lot of this evidence about
19 VPNs. You heard evidence as well that it's very common to have
20 VPNs for privacy, and it is not a crime in itself to have VPNs.
21 Many people, including Agent Ferg, use VPNs regularly. But even
22 more important than that is the testimony from the only expert
23 that the Government called, Agent Yanez, the computer forensic
24 expert who said that he found no evidence that Thomas was using
25 VPNs on his device.

1 If Thomas thought he was but he wasn't, that's just
2 more evidence that he's not tech savvy. Or if it's evidence --
3 or it's evidence of his delusion that he's not in contact with
4 reality, of what's actually going on.

5 And though the Government might say that there was
6 evidence that by sharing more things, you can then download more
7 things. You didn't hear a single time Thomas ever say that
8 himself, or even acknowledge that fact. There's no evidence that
9 Thomas knew that.

10 Though Thomas often agrees with Agent Ferg and Butler's
11 questions, that is not evidence that he understands everything
12 they're saying. When you listen to that interrogation, note that
13 he does not elaborate. He simply parrots back what he thinks
14 they want to hear, much like what Dr. Schutte told you people
15 with Asperger's do.

16 All that said, Thomas' disorders are not the only
17 problem the Government has proving their case to you. Not by a
18 long shot. There is more than a reasonable doubt that Thomas
19 actually distributed child pornography to agents as they're
20 required to show in the first count. Agent Bonneau was the only
21 person who could have actually accessed the files that his
22 program took from the specific internet address at 404 Seals.

23 But he testified to a very hands-off approach. He
24 described it as being a passenger in a self-driving vehicle. And
25 as such, he testified that he never even looked at any of the

1 items that the program downloaded. Agents Ferg and Yanez
2 testified that they received files later that they tried to match
3 with what they believe the Government's computer got by using the
4 names of the files. There is no evidence that they used the
5 content to match those two things.

6 And as you heard from Agent Yanez, it's the content.
7 The content is not the same as the name of a file. They can't be
8 certain that what they showed you was the image downloaded from
9 the IP address on January 9th, 2020. And that's what they would
10 need to prove to you to prove the distribution.

11 But that is not all. Thomas, the guy who never tried
12 to hide his actions from agents from his first interrogation on
13 and was brutally honest said multiple times that he did not
14 intentionally distribute child pornography. The program that he
15 used had sharing capabilities as a default.

16 You heard that Thomas did not actively send any images
17 or videos to the Government. Rather, the Government actively
18 retrieved them from his account. All actions were on the part of
19 the Government, not Thomas.

20 Whether or not Thomas later said I should have disabled
21 that has nothing to do with his intent at the time of the
22 offense. Those statements were made after agents had already
23 mentioned the sharing feature, and mentioned that by not turning
24 off that default feature, that they believe he shared these
25 files.

1 Could someone like Thomas really knowingly distribute
2 images under these circumstances? Please keep in mind it is the
3 Government's burden to prove each and every element of the
4 charges against Thomas beyond a reasonable doubt. That is the
5 highest standard of proof in the land. It is your sacred duty to
6 hold them to that burden.

7 Our burden, even if they're able to do that, is lower.
8 And you must only find that Thomas was insane by clear and
9 convincing evidence as the Judge described to you. After hearing
10 all the evidence in this case, these two things are clear, Thomas
11 didn't knowingly possess and distribute child pornography beyond
12 a reasonable doubt. And even if he could with his mental
13 disorders, he wasn't able to understand the wrongfulness of his
14 actions.

15 We are not here because Thomas personally abused a
16 child. We are here because he is mentally ill. So knowing all
17 this, we simply ask that you do justice in this case. Find
18 Thomas not guilty on all counts.

19 THE COURT: Thank you, Ms. Bataller.

20 Mr. Greenbaum, you have 13 minutes and 30 seconds
21 should you choose to take it.

22 REBUTTAL CLOSING ARGUMENT BY THE GOVERNMENT

23 MR. GREENBAUM: Thank you, Your Honor. May it please
24 the Court, opposing Counsel, my colleague. First off, I want to
25 thank each and every one of you for your time and attention in

1 this matter. I know you looked at some very difficult material
2 in this case, and I apologize that you had to look at those
3 things as part of the evidence.

4 Now let's talk about what I want to talk to you a
5 little bit about is the charge. So as we kind of go through it.
6 Let's look at Page 2 of your charge. And on Page 2 of your
7 charge, you're to render your verdict solely upon the evidence
8 without prejudice or sympathy. So without sympathy for any party
9 whether that's the defendant or any other party, it's without
10 prejudice or sympathy. And that's the law that the Court has
11 given you. Okay?

12 So let's look a little further on your charge, and let
13 me just highlight a few things. On Paragraph or Page number 6,
14 expert testimony. Just because, and again merely because such a
15 witness has expressed an opinion does not mean however that you
16 must accept his opinion. That is talking about an expert
17 opinion, in other words specifically I'm talking about
18 Dr. Schutte.

19 And we're going to go over some of those things where
20 the Government believes Dr. Schutte got it wrong in this case
21 just like you heard testimony on other cases where he got it
22 wrong and juries felt that he also got it wrong. Now, moving
23 along, let's go ahead and here's really where I want you to pay
24 very close attention, please.

25 On Paragraph, it's going to be Page 18. And I want to

1 read to you insanity. And I want to read to you the second
2 snippet of insanity. If we could just pull that up. This is
3 what they have to meet.

4 The first thing they have to meet, and that's going to
5 be number one, let me go ahead and read it. At the time of the
6 crime, the defendant suffered from a severe mental disease or
7 defect and, so he has to have two things that he has to meet, and
8 secondly, because of that severe mental disease or defect, the
9 defendant was unable to appreciate the nature and quality of his
10 actions or was unable to appreciate that his actions, or his
11 acts, I'm sorry, were wrong. Mental disease or defect did not
12 otherwise constitute a defense.

13 So let's look at that. That he was unable to
14 appreciate that his actions were wrong. Again, when you're
15 deciding this issue of sanity that the defendant was unable to
16 appreciate his actions were wrong. And let's look at these
17 things. Let's just look at a couple of things.

18 And how do we know that he appreciates what he's doing
19 is wrong? Well, remember the DPS lady, Michelle Wilson, that
20 came and testified? The defendant in his own words said he uses
21 VPNs, in other words disguised his location for risky downloads.
22 That's the reason why he does that.

23 So again, unable to appreciate his actions were wrong.
24 Well, he knows and he has the smarts to use VPNs so he can
25 disguise his risky downloads. And he did it well. We got a

1 whole bunch of items right here containing child pornography.
2 Eight-plus items. Eight items, I believe. Eight items.

3 And this is not just one oops, I did it. This is
4 100,000 items, 100,000 images or videos. So when they say that,
5 you remember that he, in his own words, he was using that for
6 risky downloads.

7 In regards to Defense wanted to talk about knowledge.
8 There was no way, one, he couldn't appreciate what he was doing
9 was wrong. And the other way, there was no way he would
10 knowingly know how to download or -- download this stuff
11 knowingly.

12 Well, let's look again. Let's talk about Michelle
13 Wilson. In regards to the search terms, she asked hey, in
14 regards to search terms, have you searched for PTHC, Lolita,
15 preteen hardcore, preteen softcore, and his answer was he agreed
16 to that. So that goes to the knowledge, the knowing that you
17 know exactly what you're looking for.

18 This is not I'm looking for the sports news of the
19 Astros score or the Rangers score. You're looking for specific
20 things, so many specific things that it's lobbed up or jammed up
21 on eight devices that are labeled on not only that table, but now
22 it's on the floor too as you see two desktops there.

23 As I continue on, that he didn't know, he didn't know
24 what -- he couldn't knowingly possess this, he wouldn't have
25 known what he was doing. Well specifically when Michelle Wilson

1 asked what groups were you interested in, eight, nine, and ten.
2 So that again goes to his knowledge of exactly what he's looking
3 for.

4 And then in regards to knowledge and knowing right from
5 wrong, when talking about the sharing feature, and I'll talk
6 about this BitTorrent software, this complicated software that
7 you heard from Agent Bonneau that had I believe it was, if I
8 remember correct, 40 hours of training to figure out how to use
9 this software, that you have to have some sort of computer savvy
10 or tech savvy to be able to use this software.

11 But in regards to it, the way the software works, and
12 you heard that video, as you're downloading, you're sharing. And
13 he knew about the feature. And how do we know he knew about the
14 feature? Because in his own words to Michelle Taylor he said I
15 should have disabled that feature. I wasn't worried about it. I
16 use multiple VPNs to ensure there wasn't any leaks.

17 So again, when you decide whether he knew right or
18 wrong, he knew he didn't have to worry about it because he used
19 multiple VPNs to cover his tracks, to ensure there wasn't any
20 leaks. And that's his words.

21 And then let's talk about his knowledge. You know, his
22 knowledge of BitTorrent, BitTorrent, that complicated software
23 that you saw an informational video about, a minute and a half.
24 To be honest, I've been trying to avoid BitTorrent for years
25 because I was afraid that -- I'm sorry. To be honest, I've been

1 trying to avoid BitTorrent for years because I was afraid this
2 would happen. I was afraid about being found out and being
3 raided. I'm just paraphrasing here. And this is exactly what
4 happened.

5 So he knew right from wrong. So he knew that
6 potentially he could be found out, and he knew that he could be
7 possibly raided. And he said that's exactly what happened here.
8 And in regards to defense says well he's just parroting what the
9 agents told him, well we know that's not entirely true because
10 when he met Coleman Boring, the special agent that you heard
11 talk, the agent trainee --

12 THE COURT: Mr. Greenbaum, back up just a little bit.

13 MR. GREENBAUM: Yes, Your Honor. I apologize.

14 THE COURT: It's all right.

15 MR. GREENBAUM: He said -- this is his words before
16 (indiscernible) ask questions for Mr. Boring, you got this
17 information illegally. So he knew that information that he had
18 there was illegal. So --

19 MS. BATALLER-SCHNEIDER: Your Honor, I'm going to
20 object to his characterization of what was the evidence.

21 THE COURT: All right, thank you. The jury will -- is
22 reminded that what the lawyers say is not evidence. You'll
23 remember the testimony as you heard it during the trial.

24 Mr. Greenbaum, go ahead.

25 MR. GREENBAUM: Thank you. And so you'll see that

1 statement, or you heard that statement yourself. And there's no
2 way they got past my VPNs. Again, to cover his tracks because he
3 knew right from wrong.

4 Now let's talk about certain things. Let's just talk
5 about, let me start off with the defendant. The defendant asked,
6 Dr. Schutte, were you aware what kind of grades he made in high
7 school? Oh, yeah. He made As, Bs, and Cs. Graduated high
8 school.

9 Oh, what about his college? Oh, he completed three
10 years of college. Oh, did you look at a transcript or any kind
11 of, you know, classes? Maybe that's important to see what kind
12 of technical classes he had. No, I didn't look at any of that
13 type of stuff.

14 Okay. But even so, as you kind of went along, Defense
15 Counsel talked to you about this sex demon. So I asked
16 Dr. Schutte you're not telling us that the sex demon made him
17 download 100,000 images of child porn. Oh no, I'm not saying
18 that. That's not my testimony. That's the way I recalled it.

19 So this thing about a sex demon, even their own expert
20 is saying that didn't cause him to download 100,000 images, even
21 if that was to be true. And how did Dr. Schutte come to this
22 analysis? Well he spoke to this gentleman about a year ago for
23 two hours, and then he says okay, he's obviously -- he's got
24 these issues. You know.

25 But he doesn't look at all the things. He didn't look

1 at all the reports, he didn't -- he got most of what he came up
2 with from speaking to the defendant. So the premise is if the
3 information is faulty going in, it's faulty going out. And here
4 we know even Dr. Schutte's own testimony that he's not saying
5 that this sex demon made him do this.

6 Now let's talk about just a level of sophistication.
7 We're talking about BitTorrent software, Tixati, specialized
8 software that these agents get specialized training to even know
9 how it operates that this defendant, I tender to you and I
10 proffer and argue to you, had very good knowledge, very good
11 knowledge as you see these eight devices laying here.

12 He had very good knowledge of VPNs. And he didn't just
13 run one VPN. He ran two VPNs to cover his tracks. And
14 furthermore, I don't know if you remember the -- when the Butler,
15 the other agent that was there on the recording, he was like hey,
16 explain this to me. And he gets upset, that being the defendant,
17 with Butler like I already told you, something to that effect,
18 how these computers work.

19 And he was talking about using secure delete. Not just
20 regular delete like us that go and delete a file. He wanted to
21 make sure that he could get rid of it permanently. Secure
22 delete. Again, this is an extra level of knowledge, an extra
23 level of expertise that this defendant had in regards to
24 computers.

25 And you heard Dr. Schutte. And obviously this is

1 common sense. And you guys use common sense when you go back
2 there in the jury room. He said well, it's kind of like, you
3 know, people with autism. Sometimes they like to collect cars
4 or, you know, so is that like baseball cards. You know, some
5 kids like to collect baseball cards.

6 Well, not everybody with autism is collecting 100,000
7 images or videos of child pornography. That's just not, you
8 know, I think common sense would tell us that. And I'll let you
9 decide on that.

10 And so to make it sound like it's little toys or doing
11 some research, and speaking of doing research, the defendant
12 himself admitted to agents oh, I looked this up. I looked up
13 Supreme Court holdings and rulings to see what was legal and not
14 legal. And in regards to that, oh, I'm at that grey area. I
15 like to be in that grey area. And that's what this defendant
16 said. That's his words.

17 And you have the, you know, you can confirm that. You
18 can confirm that. You can take back his statement --

19 THE COURT: Two minutes.

20 MR. GREENBAUM: Thank you, Your Honor. The evidence is
21 overwhelming. It's clear. So how we get to the distribution
22 count. Well, by nature of that BitTorrent software. In other
23 words, when he is downloading, he is distributing. And so in
24 this case what happened was Agent Bonneau got 17 pieces, 17
25 pieces of child pornography from this defendant. So that's the

1 distribution count.

2 So in other words, it's travel through the computer,
3 got to Agent Bonneau. And then we're talking about the
4 possession of child pornography. Well, everybody has stipulated,
5 both the Defense and the Government, you can read that in the
6 charge that this is in fact child pornography.

7 And so that's for the remainder of the counts, the
8 remainder of the counts from 2 through 9. And those counts, each
9 and every one, unfortunately we had to show you those exhibits.
10 But you even heard from a special agent from Austin that some of
11 those people were living people that still are living to this day
12 that are depicted that this child pornography has gone through
13 the country.

14 So on that, one of the things we have to prove that he
15 had possession of it. He clearly did.

16 THE COURT: One minute.

17 MR. GREENBAUM: It's right in front of you. And the
18 second thing is that it got -- that it was in interstate
19 commerce. Well how do we know it's interstate commerce? Well,
20 that goes back to where the computer or hard drive was
21 manufactured. And Mr. Cayton has told you that this was from
22 different Asian countries.

23 At the close of this, I would ask that you render the
24 only true and just verdict, and that's guilty on all counts.
25 Thank you very much.

1 THE COURT: Thank you to the attorneys. If you need to
2 communicate with me during your deliberations, the foreperson
3 should write the message and give it to the court security
4 officer. I'll either reply in writing or bring you back in court
5 to answer your message.

6 Bear in mind that you're never to reveal to any person,
7 not even to the Court, how the jury stands numerically or
8 otherwise on any count of the indictment until after you have
9 reached a unanimous verdict.

10 In a moment, you're going to retire. When you do,
11 we're going to have to say goodbye to our alternates, Mr. Balsher
12 (phonetic) and Mr. Ashburg (phonetic). When the jury retires, if
13 you'll retire with them and then gather any of your belongings
14 and go out the other door. I'm going to have the court security
15 officer usher you into the chambers next door. I want to visit
16 with you just briefly and give you my personal thanks.

17 You may take your notebooks if you want. You may take
18 your Court's charge to the jury if you want. You can leave them
19 here if you want. Let's rise as this jury retires to deliberate.
20 Thank you.

21 (Jury retires to deliberate at 3:17 p.m.)

22 THE COURT: All right. Outside the presence of the
23 jury. Government have anything you need to take up?

24 MR. GREENBAUM: No, Your Honor.

25 THE COURT: Defense?

1 MS. BATALLER-SCHNEIDER: No, Your Honor.

2 THE COURT: All right. We'll be in recess. Stay
3 close, please.

4 (Recess at 3:18 p.m./Reconvened at 4:07 p.m.)

5 (Outside the presence of the jury; defendant present)

6 THE CLERK: All rise.

7 THE COURT: All right. I'm told that we have a
8 verdict. Does the Government have anything we need to take up
9 before we bring the jury in?

10 MR. GREENBAUM: No, Your Honor. Thank you.

11 THE COURT: Defense?

12 MS. BATALLER-SCHNEIDER: No, Your Honor.

13 THE COURT: Okay. So we'll bring the jury in. We'll
14 have everybody sit. And then I'll have the defendant rise with
15 Counsel. No matter -- I don't know what the verdict is, I have
16 no idea. Whatever it is, no outward display of emotion, please,
17 I beg you. And if an attorney does it, there will be
18 consequences.

19 So go right ahead and let's bring the jury in.

20 (Jury in at 4:07 p.m.)

21 THE COURT: All right. Please be seated. Thank you.
22 Speaking through your foreperson, if you would stand, sir. Has
23 the jury reached a verdict?

24 JURY FOREPERSON: Yes. Yes, Your Honor, we have.

25 THE COURT: If you'd hand that. If you'll stay where

1 you are, the court security officer will come to you. Thank you
2 very much. You may be seated. Thank you, sir.

3 The defendant will please rise.

4 THE CLERK: In 20-CR-388, United States of America
5 versus Thomas Scott Perkins, verdict form. Count 1, we the jury
6 find the defendant Thomas Scott Perkins is guilty of the offense
7 charged in Count 1 of the indictment. Count 2, we the jury find
8 that defendant Thomas Scott Perkins is guilty of the offense
9 charged in Count 2 of the indictment.

10 Count 3, we the jury find the defendant Thomas Scott
11 Perkins is guilty of the offense charged in Count 3 of the
12 indictment. Count 4, we the jury find the defendant Thomas Scott
13 Perkins is guilty of the offense charged in Count 4 of the
14 indictment.

15 Count 5, we the jury find the defendant Thomas Scott
16 Perkins is guilty of the offense charged in Count 5 of the
17 indictment. Count 6, we the jury find the defendant Thomas Scott
18 Perkins is guilty of the offense charged in Count 6 of the
19 indictment.

20 Count 7, we the jury find the defendant Thomas Scott
21 Perkins is guilty of the offense charged in Count 7 of the
22 indictment. Count 8, we the jury find the defendant Thomas Scott
23 Perkins is guilty of the offense charged in Count 8 of the
24 indictment.

25 Count 9, we the jury find the defendant Thomas Scott

1 Perkins is guilty of the offense charged in Count 9 of the
2 indictment. Signed by the foreperson of the jury.

3 THE COURT: Thank you. You all may be seated.

4 Ms. Bataller, does the Defense wish the Court to poll the jury?

5 MS. BATALLER-SCHNEIDER: Yes, Your Honor. Please.

6 THE COURT: Absolutely. So here's what we're going to
7 do. You have a number on your juror badge. And you have that
8 number for this reason. Ms. Lerma is going to stand in a moment
9 and call you by number, and you'll just answer. Your answer is
10 going to be yes or no. You stay seated, you don't have to stand
11 up. She'll stand. You just say yes or no.

12 The question is this. She's not going to repeat the
13 question each time. I'm going to tell you this one time. The
14 question is, is your personal verdict reflected by the verdict of
15 the jury, yes or no. Ms. Lerma?

16 THE CLERK: Juror number 1?

17 JUROR NO. 1: Yes.

18 THE CLERK: Juror number 2?

19 JUROR NO. 2: Yes.

20 THE CLERK: Juror number 3?

21 JUROR NO. 3: Yes.

22 THE CLERK: Juror number 4?

23 JUROR NO. 4: Yes.

24 THE CLERK: Juror number 5?

25 JUROR NO. 5: Yes.

1 THE CLERK: Juror number 6?

2 JUROR NO. 6: Yes.

3 THE CLERK: Juror number 7?

4 JUROR NO. 7: Yes.

5 THE CLERK: Juror number 8?

6 JUROR NO. 8: Yes.

7 THE CLERK: Juror number 9?

8 JUROR NO. 9: Yes.

9 THE CLERK: Juror number 10?

10 JUROR NO. 10: Yes.

11 THE CLERK: Juror number 11?

12 JUROR NO. 11: Yes.

13 THE CLERK: Juror number 12?

14 JUROR NO. 12: Yes.

15 THE COURT: Thank you all. I get to be the first to
16 thank you after the verdict. We obviously can't do this without
17 you. We have to have you. And we truly appreciate you stepping
18 up and doing this.

19 You're now released from your oath which means that you
20 can speak with anybody you want to about the case. It also means
21 you don't have to speak with anybody if you don't want to talk to
22 anybody about the case.

23 I am going to ask you to retire one last time and wait
24 for me to come join you in the jury room. I'd like to speak with
25 you privately for just a few minutes. I need to do about two to

1 three minutes or so business with the attorneys and the
2 defendant, and then I'll come right back in there with you.

3 With that, let's rise for the jury as they retire one
4 last time. Thank you all very much.

5 (Jury excused at 4:12 p.m.)

6 THE COURT: All right. Please be seated.

7 All right. The jury having returned a verdict of
8 guilty in Counts 1 through 9, the Court will refer your case, Mr.
9 Perkins, to the U.S. Probation Office for the preparation of the
10 presentence investigation report. You'll have input into the
11 making of that report. Your attorneys are going to guide you
12 through that process.

13 Your attorneys then will receive a copy of the report
14 well before your sentencing hearing. They'll file objections if
15 there are objections they're able to file on your behalf. The
16 Government has the same opportunity to file objections.

17 If there are any objections, oftentimes those are
18 resolved prior to trial. If there are any objections that remain
19 outstanding at the time of your sentencing hearing, excuse me,
20 then we'll take those up after sentencing hearing. Typically
21 that means there will be argument of the attorneys. Sometimes
22 even there's some testimony. But then I'll make the decision on
23 any outstanding objections.

24 One of your attorneys will speak on your behalf, and
25 then you have the right and will have the opportunity to speak to

1 me before I sentence you on that date. It's going to be, I'm
2 going to set sentencing for October 24th, 2022. It's at 8:00
3 a.m. That will be in Alpine.

4 And that can move. Sometimes we can move it up, it can
5 move back. But October 24th is what we're going to shoot for.
6 And probation will be in touch with your attorneys.

7 With that, Mr. Greenbaum, Mr. Cayton, anything further
8 on behalf of the Government?

9 MR. GREENBAUM: No, Your Honor. Thank you.

10 THE COURT: Ms. Bataller, Mr. Gorman, anything?

11 MS. BATALLER-SCHNEIDER: No, Your Honor. Thank you.

12 THE COURT: Thank you. If you could, I'd ask the
13 marshals to take the defendant and then I'd like to speak with
14 the attorneys for, like, one minute. So, Mr. Perkins, I'll
15 remand you to the custody of the United States Marshals pending
16 your sentencing hearing. Thank you.

17 Y'all can have a seat. I just wanted to tell all of
18 you on the record without Mr. Perkins here, I don't want to
19 embarrass him, but I thought it was as well tried a case as I've
20 seen in a long time. It's a very difficult subject matter. I
21 just didn't want to embarrass him with talking about the subject
22 matter.

23 It's just a difficult topic. Nobody likes that sort of
24 thing. What each and every one of you did though in prosecuting
25 or defending, paralegaling for the Government, paralegaling for

1 the Defense is an honorable thing. And I think the Constitution
2 was upheld. And we'll see, I guess.

3 But I hope Ms. Bataller and Mr. Gorman, that you all
4 will come back often. And Ms. Williams is always welcome. And I
5 don't know about y'all. Y'all are always here whether I want you
6 to be here or not. But I was real proud of you all.

7 And I think every time we try a case, we become sort of
8 an icon for what somebody knows as the criminal justice system.
9 That's what, you know, they'll think of you, your picture, your
10 face. And that's what they'll think of.

11 And so difficult case. Honestly, no matter how it
12 turned out, that's the way I felt. I was thinking through it
13 last night and this morning. I thought it was tried honorably,
14 and I wish, I hope that we can, you know, our courts throughout
15 the nation are filled with lawyers like you all to try cases like
16 this. They're cases of importance. It's important to everyone,
17 the least of which is certainly not Mr. Perkins. It's very
18 important to him. It's very important to others, as well.

19 And so I thank you all for the -- I know it was a lot
20 shorter than we all thought. I thought it would be Thursday or
21 so. I think, you know, the lawyers were using their judgment.
22 And I'd say this even if it took us all week or two weeks. I'd
23 still say this.

24 I think that the way you all interacted with each
25 other, the way you all worked together to try to come up with

1 agreements. If you couldn't, you couldn't because you have to
2 represent your clients. But the fact that you all worked
3 together, you know, shows me sort of the best of what our
4 industry has to offer. And it's kind of exciting, frankly, to
5 see.

6 With that, there are real consequences, I know. And
7 those are never easy to take. So with that, anything more for
8 the Government?

9 MR. GREENBAUM: No, Your Honor. Thank you.

10 THE COURT: Ms. --

11 MS. BATALLER-SCHNEIDER: No, Your Honor. Thank you.

12 THE COURT: Y'all be safe. Everybody be safe. I know
13 everybody's traveling, so y'all be careful.

14 MR. GORMAN: Thank you, Your Honor.

15 THE COURT: And we'll be adjourned.

16 MR. CAYTON: Thank you, Your Honor.

17 (Proceedings adjourned at 4:17 p.m.)

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C E R T I F I C A T E

I, DIPTI PATEL, court-approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.



DIPTI PATEL, CET-997

LIBERTY TRANSCRIPTS

Date: January 3, 2023